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VOL. 41—INDIANA REPORTS.

41	1	41	134	41	186	41	263	41	303	41	346	41	410	41	459	41	504	41	559
47	238	49	301	44	459	45	399	46	367	117	375	49	290	47	321	50	555	49	180
54	239	51	109	45	98	48	259	48	213	41	356	68	506	61	354	51	60	50	417
64	13	67	86	112	309	50	249	41	305	67	439	41	413	68	93	77	363	56	424
72	102	69	395	113	594	50	500	48	78	110	304	41	397	70	214	78	593	57	319
78	444	69	437	41	196	52	233	51	225	41	364	42	538	71	18	82	342	65	108
41	19	72	60	44	473	52	410	51	60	43	459	44	283	71	26	91	396	65	137
45	239	100	319	68	52	56	422	54	592	44	258	44	468	71	157	106	298	66	295
65	127	41	133	104	107	41	269	57	367	47	289	44	475	72	102	122	304	71	580
70	416	49	52	41	197	47	394	58	575	47	442	45	283	84	35	41	511	76	421
81	197	98	496	58	339	77	184	66	574	50	58	46	288	107	240	57	431	78	313
91	363	41	143	62	282	41	272	70	46	56	217	47	259	107	243	61	203	86	598
118	304	80	53	104	172	41	275	76	500	56	324	55	454	112	314	41	515	89	14
41	24	41	144	107	231	52	181	41	308	71	211	61	332	41	464	45	262	102	29
84	486	80	53	41	199	62	473	48	147	72	517	61	507	47	530	70	15	117	202
86	456	51	24	41	276	49	487	82	571	62	415	57	73	71	406	41	567		
93	331	41	149	41	204	50	577	77	195	87	396	64	355	65	511	75	30	83	365
106	123	53	145	47	16	54	217	104	560	88	568	68	453	41	466	76	421	41	570
41	35	53	158	47	16	105	133	113	480	89	519	73	515	63	282	89	14	110	94
54	475	41	151	48	301	41	277	42	36	41	312	91	135	77	473	41	528	41	573
73	190	81	506	50	167	80	53	46	567	91	559	81	91	77	523	42	292	63	598
41	48	92	44	55	393	41	278	46	573	105	575	54	481	47	562	71	279	41	580
47	45	41	153	57	126	45	310	47	269	108	196	41	426	49	340	42	151	41	586
47	268	47	568	67	513	49	584	48	494	111	136	70	481	72	526	68	119	47	12
47	394	41	154	84	92	87	602	54	89	111	194	89	248	93	60	73	448	47	307
48	345	41	158	41	210	105	117	58	146	119	30	41	432	41	476	74	352	52	89
51	44	41	158	63	72	41	281	61	446	41	390	46	49	100	265	81	164	52	94
68	448	49	39	41	212	97	464	62	455	41	568	49	167	53	65	48	577	89	316
77	184	81	321	50	176	41	288	76	239	49	440	59	332	52	233	94	366	77	599
80	179	41	162	65	200	41	269	79	472	51	588	60	570	59	190	41	539	83	384
96	361	45	380	60	514	42	323	88	234	60	197	66	540	59	220	88	498	86	94
96	365	48	293	68	577	43	284	92	441	61	166	78	16	92	468	101	132	109	330
103	47	74	205	41	216	44	283	93	399	62	450	82	520	102	136	41	543		
114	478	103	135	47	596	49	138	41	361	63	172	95	562	115	107	42	297		
117	505	112	142	49	337	49	375	46	281	67	498	97	446	41	486	42	382		
119	530	116	496	56	595	50	349	57	248	69	50	97	513	54	51	42	601		
120	265	41	165	97	310	50	500	60	109	83	365	55	230	41	436	43	432		
41	79	61	332	41	221	52	410	71	477	89	515	63	135	41	489	44	296		
45	280	72	309	41	228	53	186	106	15	94	371	87	485	42	600	45	84		
46	99	41	108	43	353	53	305	41	333	41	396	41	440	48	44	45	371		
46	192	52	145	49	600	56	422	46	345	44	468	45	368	52	368	46	284		
50	313	80	94	63	266	65	425	63	441	44	475	48	78	58	67	46	317		
51	356	41	170	76	121	63	351	41	335	46	288	51	68	60	402	46	319		
55	450	41	376	84	78	66	159	45	549	47	259	52	406	62	152	46	472		
41	87	82	531	87	143	73	110	52	171	68	453	53	227	64	223	47	189		
53	196	87	304	107	454	74	59	75	171	41	398	53	328	64	296	48	430		
109	573	120	424	114	205	74	113	79	263	51	460	55	124	64	566	51	158		
41	92	41	174	41	228	84	159	95	133	59	356	61	235	65	581	52	177		
44	111	65	470	41	259	85	113	101	369	85	253	78	467	67	139	62	203		
73	569	120	15	51	154	87	389	106	84	97	34	82	532	67	319	65	224		
80	550	41	180	66	49	89	44	107	176	41	399	83	146	68	439	70	114		
90	154	47	596	79	117	89	394	110	148	48	402	102	109	68	451	73	584		
97	357	49	337	81	397	98	99	41	338	50	444	41	445	70	187	76	472		
98	440	87	218	87	201	98	356	77	131	51	217	71	282	71	570	81	29		
99	334	94	491	98	190	98	368	95	339	57	187	41	450	72	326	83	302		
41	109	41	181	99	14	98	526	41	339	58	16	47	16	78	215	90	239		
76	361	49	100	99	25	99	399	54	583	58	180	47	581	83	254	92	481		
82	94	41	260	105	296	99	455	55	69	63	467	41	456	93	563	101	593		
123	496	41	184	102	288	102	389	76	204	65	152	57	276	120	331	103	36		
41	116	56	432	64	590	102	288	41	344	70	458	71	462	41	493				
53	281	58	327	73	115	105	522	56	373	78	63	82	43	47	493				
91	207	71	100	105	583	64	447	84	487	83	74	59	322						
103	291	74	303	100	253	72	8	89	50										
41	122	79	449	41	301	80	210	107	597										
65	19	98	6	48	50	92	126	41	406										
				48	178	95	400	52	414										
						101	315	62	552										

45

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INDIANA REPORTS.

VOLUME XLI.

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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CASES CITED
AND AN INDEX.

BY JAMES B. BLACK,
OFFICIAL REPORTER.

VOL. XLI.

CONTAINING THE CASES DECIDED AT THE NOVEMBER TERM,
1872, NOT PUBLISHED IN VOL. XL., AND CASES
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ALEXANDER C. DOWNEY, LL. D.
JAMES L. WORDEN, LL. D.
SAMUEL H. BUSKIRK, LL. D.

*Chief Justice at the November Term, 1872.

†Chief Justice at the May Term, 1873.

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TABLE OF THE CASES

REPORTED IN THIS VOLUME.

A			
Aldrich, Gaskill v.....	338	Buckles, Gavin v.....	528
Allis et al. v. Nanson et al.....	154	Burkhart et al., The Water Works Co. of Indianapolis et al. v.....	364
Allison et al., Rose v.....	276	Butler et al., Heaton v.....	143
		Byard, Dawson v.....	165
B		C	
Bainbridge, Sherlock et al. v.....	35	Cain v. Hunt et al.....	466
Baker, Governor, Price v.....	570	Carney v. Street et al.....	396
Baker, Governor, Price v.....	572	Cartright v. Briggs.....	184
Balfé et al., Ball v.....	221	Castle v. House.....	333
Balfé et al., Ball v.....	228	Chase et al., The State, ex rel. Matthews, v.....	356
Balfé et al., Lammers v.....	218	Cincinnati, etc., R. R. Co., Max- field v.....	269
Ball v. Balfé et al.....	221	City of Evansville v. Martin et al.....	145
Ball v. Balfé et al.....	228	City of Jeffersonville, for the use of Sweeny et al., Brookbank v.....	406
Bank of the State of Indiana, Swingle v.....	423	City of Jeffersonville, for the use of Sweeny et al., Stewart v.....	153
Banks, Hoffman v.....	1	City of Peru et al., Crowell et al. v.....	308
Bash et ux. v. Evans.....	144	City of Wabash, Sweet v.....	7
Bassett v. The State.....	303	Cole, The Ohio, etc., R. W. Co. v.....	331
Beaver, The Indianapolis, etc., R. W. Co. v.....	493	Comer et al., Roberts et al. v.....	475
Billingsly, Miller v.....	489	Crane, Trustee, Goodwine et al. v.....	335
Black, Maynard et al. v.....	310	Crawford, Ex'x, Hart v.....	197
Board of Comm'rs of Madison Co. et al., Bronenberg et al. v.....	502	Crowell et al. v. The City of Peru et al.....	308
Boatman, Keller et al. v.....	277	Cruzan v. Smith et al.....	288
Bonsell v. Bonsell.....	476		
Bowers, Adm'r, v. Van Winkle.....	432	D	
Briggs, Cartright v.....	184	Danville, etc., G. R. Co., Hamrick v.....	170
Bronenberg et al. v. The Board of Comm'rs of Madison Co. et al.....	502	Davidson et al., Hayward et al. v.....	212
Brookbank v. The City of Jeffers- onville, for the use of Sweeny et al.....	406	Davis v. Perry et al.....	305
Brookbank et ux. v. Kennard et al.....	339	Davis et al. v. Langsdale.....	399
Brooker v. Weber.....	426	Davis et al., Sparks v.....	526
Brooks v. Harris.....	390	Dawson v. Byard.....	165
Brown v. The Liberty, etc., G. R. Co. et al.....	209	Decker, Auditor, et al., Isaacs v.....	410
Brown et al., Wallace, Adm'r, v.....	436	Dodge et al. v. Dunham.....	186
Brownlee v. Kenneipp.....	216	Douglass, Trustee, Tilford, Aud'r, v.....	580
		Drook v. Irvine.....	430

Dunham, Dodge et al. v.....	186	Horn et al., Grand Rapids, etc., R. R. Co. v.....	479
Dunkin et al., Worthington v.....	515	House, Castle v.....	333
E		Hunt et al., Cain v.....	466
Earl, The State v.....	464	Huston et al. v. Neil.....	504
Estell v. The Knightstown, etc., Turnpike Co.....	174	I	
Etchison Ditching Ass'n v. Jewell.....	143	Indianapolis, etc., R. R. Co., Stout, Adm'r, v.....	149
Evans, Bash et ux. v.....	144	Indianapolis, etc., R. W. Co. v. Beaver.....	493
Evansville, City of, v. Martin et al.....	145	Irvine, Drook v.....	430
F		Isaacs v. Decker, Auditor, et al.....	410
Fatman et al. v. Leet et al.....	133	J	
Ferguson v. Ramsey.....	511	Jackson et al., Talcott et al. v.....	201
Ferguson et al. v. Wagner.....	450	Jeffersonville, etc., R. R. Co. v. Hendricks, Adm'r.....	48
Flanders, O'Brien et al. v.....	486	Jeffersonville, City of, for the use of Sweeny et al., Brookbank v.....	406
Franklin Life Ins. Co. v. Hazard.....	116	Jeffersonville, City of, for the use of Sweeny et al., Stewart v.....	153
G		Jewell, The Etchison Ditching Association v.....	143
Gadbury et al. v. Stahl, Ex'r.....	348	Johnson v. Pinegar.....	168
Gagg et al. v. Vetter.....	259	Johnson, Voss v.....	19
Gagg et al. v. Vetter et al.....	228	K	
Garner v. Gordon.....	92	Keller et al. v. Boatman.....	277
Gaskill v. Aldrich.....	338	Kelley, Gillaspie v.....	158
Gavin v. Buckles.....	528	Kennard et al., Brookbank et ux. v.....	339
Gavin et al. v. Graydon.....	559	Kenneipp, Brownlee v.....	216
Greve et al., Ham et al. v.....	531	Kepler, Klingensmith v.....	341
Gillaspie v. Kelley.....	158	Kerchaval v. The State.....	478
Glover, Nichols v.....	24	Kern, Ex'r, et al. v. Maginniss et al.....	398
Goetz v. The State.....	162	Kesler v. Myers.....	543
Goodwine et al. v. Crane, Trustee.....	335	Klingensmith v. Kepler.....	341
Gordon, Garner v.....	92	Knightstown, etc., Turnpike Co., Estell v.....	174
Grand Rapids, etc., R. R. Co. v. Horn et al.....	479	L	
Graydon, Gavin et al. v.....	559	Lafayette, etc., R. R. Co. et al. v. Pattison.....	312
Greensburgh, etc., Turnpike Co. v. Reed et al.....	143	Lagrange, The Pigeon Creek Drain- ing Association v.....	272
H		Lammers v. Balfe et al.....	218
Hain v. North-Western G. R. Co.....	196	Lane et al., Light v.....	539
Ham et al. v. Greve et al.....	531	Langsdale, Davis et al. v.....	399
Hamrick v. The Danville, etc., G. R. Co.....	170	Law et al. v. Long et ux.....	586
Harris, Brooks v.....	390	Leet et al., Fatman et al. v.....	133
Hart v. Crawford, Ex'r.....	197	Liberty, etc., G. R. Co. et al., Brown v.....	209
Hays et al. v. Vickery.....	583	Light v. Lane et al.....	539
Hayward et al. v. Davidson et al.....	212	Long et al., Miller v.....	352
Hazard, The Franklin Life Ins. Co. v.....	116	Long et ux., Law et al. v.....	586
Headrick v. Wischart.....	87	Longacre, Vines v.....	144
Heaton v. Butler et al.....	143		
Hebert, Mercer v.....	459		
Helms v. Love.....	210		
Hendricks, Adm'r, The Jefferson- ville, etc., R. R. Co. v.....	48		
Hoffman v. Banks.....	1		

TABLE OF CASES REPORTED.

ix

Love, Helms v.....210

M

Maginniss et al., Kern, Ex'r, et al.
v.....398
Maiden, Webster v.....124
Martin et al., The City of Evans-
ville v.....145
Maxfield v. The Cincinnati, etc., R.
R. Co.....269
Maynard et al. v. Black.....310
McEwen, Sayre et al. v.....109
Mercer v. Hebert.....459
Mercer v. Patterson.....440
Metzker et al., Wallace, Adm'r, v.....346
Milford, Wesley et al. v.....413
Miller v. Billingsly.....489
Miller v. Long et al.....352
Miller v. Weida et al.....199
Montmorency G. R. Co. v. Rock.....263
Moss, Over v.....463
Myers, Kesler v.....543

N

Nanson et al., Allis et al. v.....154
Nave v. Ritter.....301
Neighbert, Struble et ux. v.....344
Neil, Huston et al. v.....504
Nichols v. Glover.....24
North-Western G. R. Co., Hain v.....196

O

O'Brien et al. v. Flanders.....486
Ohio, etc., R. W. Co. v. Cole.....331
Over v. Moss.....463

P

Parton et al. v. Yates et al.....456
Patrick, Ward et al. v.....438
Patterson, Mercer v.....440
Pattison, The Lafayette, etc., R. R.
Co. et al. v.....312
Pauley v. Short.....180
Perry et al., Davis v.....305
Peru, City of, et al., Crowell et al. v.....308
Pigeon Creek Draining Association
v. Lagrange.....272
Pigeon Creek Draining Association
v. Woods.....275
Pinegar, Johnson v.....168
Plough, Reeves et al. v.....204
Potter, Sturm v.....181
Price v. Baker, Governor.....570
Price v. Baker, Governor.....572

R

Ramsey, Ferguson v.....511
Reed et al., The Greensburgh, etc.,
Turnpike Co. v.....143
Reeves et al. v. Plough.....204
Reno v. Robertson, Adm'r.....567
Richey, Comm'r, Swindell et al. v.....281
Ritter, Nave v.....301
Robbins et al., The Sand Creek
Turnpike Co. et al. v.....79
Roberts et al. v. Comer et al.....475
Robertson, Adm'r, Reno v.....567
Rock, The Montmorency G. R. Co.
v.....263
Rose v. Allison et al.....276
Russell et al., Scranage v.....277

S

Sand Creek Turnpike Co. et al. v.
Robbins et al.....79
Sandusky v. Webb et al.....478
Sayre et al. v. McEwen.....109
Scranage v. Russell et al.....277
Shelbyville, etc., Turnpike Co., The
State, ex rel. Howe, v.....151
Sherlock et al. v. Bainbridge.....35
Short, Pauley v.....180
Skeen, Ex Parte.....418
Skillen v. Skillen.....260
Skillen v. Skillen, Jr.....122
Smith et al., Cruzan v.....288
Sparks v. Davis et al.....526
Stahl, Ex'r, Gadbury et al. v.....348
State v. Earl.....464
State, Bassett v.....303
State, ex rel. Howe, v. The Shelby-
ville, etc., Turnpike Co.....151
State, ex rel. Matthews, v. Chase et
al.....356
State, ex rel. Morris, v. Wallace.....445
State, Goetz v.....162
State, Kerchaval v.....478
Stewart v. The City of Jefferson-
ville, for the use of Sweeny et al.....153
Stout, Adm'r, v. The Indianapolis,
etc., R. R. Co.....149
Street et al., Carney v.....396
Struble et ux. v. Neighbert.....344
Sturm v. Potter.....181
Sweet v. The City of Wabash.....7
Swindell et al. v. Richey, Comm'r.....281
Swingle v. The Bank of the State
of Indiana.....423

T

Talcott et al. v. Jackson et al.....201
Teague, Ex Parte.....278

TABLE OF CASES REPORTED.

Tilford, Auditor, v. Douglass, Trustee.....	580	Wallace, The State, ex rel. Morris, v.....	445
V		Ward et al. v. Patrick.....	438
Van Winkle, Bowers, Adm'r, v.....	432	Water Works Co. of Indianapolis et al. v. Burkhardt et al.....	364
Vetter, Gagg et al. v.....	259	Webb et al., Sandusky v.....	478
Vetter et al., Gagg et al. v.....	228	Weber, Brooker v.....	426
Vickery, Hays et al. v.....	583	Webster v. Maiden.....	124
Vines v. Longacre.....	144	Weida et al., Miller v.....	199
Voss v. Johnson.....	19	Wesley et al. v. Milford.....	413
W		Wisehart, Headrick v.....	87
Wabash, City of, Sweet v.....	7	Woods, The Pigeon Creek Draining Association v.....	275
Wagner, Ferguson et al. v.....	450	Worthington v. Dunkin et al.....	515
Wallace, Adm'r, v. Brown et al.....	436	Y	
Wallace, Adm'r, v. Metzker et al....	346	Yates et al., Paxton et al. v.....	456

In *Cobb v. Krutz*, 40 Ind. 323, it should have been stated that DOWNNEY, J., having been of counsel, was absent.

TABLE OF THE CASES

CITED IN THIS VOLUME.

A

Abshire v. Mather, 27 Ind. 381.....512
 Adams v. Palmer, 51 Me. 480.....598
 Addleman v. Erwin, 6 Ind. 494.....293
 Aiken v. Bruen, 21 Ind. 137.....471
 Albany Street, In re, 11 Wend. 149...370
 Aldridge v. Great Western R. W. Co.
 3 Man. & G. 515.....241
 Alexander v. The State, 9 Ind. 337...381
 Allison's Devises v. Allison's Heirs,
 7 Dana, 90.....444
 Amesbury Woollen, etc., Co. v. The
 Inhabitants of Amesbury, 17 Mass.
 461.....321
 Anderson v. Coonley, 21 Wend. 279.297
 Armstrong v. Nichols, 32 Ind. 408...434
 Ashley v. Ashley, 3 Sim. 149.....119
 Ashmole v. Wainwright, 2 A. & E.,
 N. S. 837.....326
 Astley v. Reynolds, 2 Stra. 916.....323
 Austin v. Willson's Ex'rs, 21 Ind.
 252.....438

B

Bachelder v. Heagan, 18 Me. 32....251
 Bainbridge v. Sherlock, 29 Ind. 364.. 41
 Baker v. Gordon, 23 Ind. 204.....101
 Baker v. Johnson, 2 Hill N. Y. 342...389
 Baker v. Kirk, 33 Ind. 517.....574
 Baker v. Tobin, 40 Ind. 310.....153
 Balfie v. Johnson, 40 Ind. 235...220,225
 Ball v. Balfie, 41 Ind. 221.....228
 Ball v. Herbert, 3 T. R. 253..... 46
 Ball v. Silver, 17 Ind. 539.....491
 Baltimore, etc., R. R. Co. v. Mc-
 Whinney, 36 Ind. 436.....486
 Bank of the U. S. v. Tyler, 4 Pet.
 366.....115
 Bannister v. Allen, 1 Blackf. 414...555
 Barnaby v. Barnaby, 1 Pick. 221...596
 Barnard v. Graham, 14 Ind. 322....439

Barnard v. Poor, 21 Pick. 378.....251
 Barnes v. Cole, 21 Wend. 188..... 68
 Barnes v. The State, 28 Ind. 82.....276,
 422
 Bartlet v. King, 12 Mass. 555.....383
 Beals v. Beals, 20 Ind. 163.....492
 Beekman v. Saratoga, etc., R. R.
 Co., 3 Paige, 73.....373
 Bell v. Rinker, 29 Ind. 267.....549
 Belton v. Baxter, 2 Sweeny N. Y.
 339.....254
 Belton v. Briggs, 4 Des. 464.....598
 Bennifield v. Hypres, 38 Ind. 498...102
 Bernitz v. Stratford, 22 Ind. 320...115
 Bird v. Lanius, 7 Ind. 615.....491
 Blacklege v. Benedict, 12 Ind. 389.166
 Blain v. Bailey, 35 Ind. 165.....381
 Blain v. Harrison, 11 Ill. 384.....602
 Blake v. Heyward, Bailey Eq. 201.602
 Blankenship v. Rogers, 10 Ind. 333.192
 Blankenship v. Stout, 25 Ill. 132...599
 Blew v. Hoover, 30 Ind. 450.....190
 Blizzard v. Phebus, 35 Ind. 284....549
 Blundell v. Catterall, 5 B. & Ald.
 268.....46
 Blyth v. Topham, 4 Cro. Jac. 158...250
 Board of Commissioners of Brown
 Co. v. Summerfield, 36 Ind. 543.449
 Board of Comm'rs of La Grange
 Co. v. Cutler, 6 Ind. 354.....388
 Board of Comm'rs of La Grange
 Co. v. Newman, 35 Ind. 10.....336
 Board of Comm'rs of Miami Co. v.
 Blake, 21 Ind. 32.....448
 Bodertha v. Spencer, 40 Ind. 353...413
 Bolster v. Catterlin, 10 Ind. 117...166
 Booker v. Ray, 17 Ind. 522.....463
 Bool v. Mix, 17 Wend. 119.....597
 Booth v. Shepherd, 8 Ohio St. 243.. 41
 Boston Bank v. Chamberlin, 15
 Mass. 220.....595
 Boston, etc., Glass Co. v. City of
 Boston, 4 Met. 181.....321
 Boulden v. Scircle, 34 Ind. 60.....266

Bourgette v. Hubinger, 30 Ind. 296.562	Clute v. Small, 17 Wend. 238.....160	
Bowman v. Mallory, 14 Ind. 424... 62	Coats v. McKee, 26 Ind. 223.....434	
Bowman's Devises v. Wathen, 2 McLean, 376..... 42	Cochran v. Dodd, 16 Ind. 476.....549	
Boyd v. Boyd, 27 Ind. 429..... 62	Coffin v. Jones, 13 Pick. 441..... 444	
Bradfield v. M'Cormick, 3 Blackf. 161441	Coghill v. The State, 37 Ind. 111...381	
Brinkmeyer v. The City of Evansville, 29 Ind. 187..... 18	Coleman v. Hart, 25 Ind. 256.....185	
Britzell v. Fryberger, 2 Ind. 176.....491	Colerick v. Hooper, 3 Ind. 316.....555	
Brooklyn Park Comm'rs v. Armstrong, 45 N. Y. 234.....375	Collins v. Archer, 1 Russ. & M. 284.....602	
Brooks v. Berryhill, 20 Ind. 97.....321	Collins v. The U. S. Express Co., 27 Ind. 11.....477	
Brooks v. Harris, 41 Ind. 390.....568	Commonwealth v. M'Allister, 2 Watts, 190.....387	
Brown v. King, 2 Ind. 520.....585	Conklin v. Smith, 7 Ind. 107.....491	
Brown v. Osborne, 1 Blackf. 32.....555	Conwell v. Buchanan, 7 Blackf. 537.513	
Brown v. Snavely, 24 Ind. 270.....334	Conwell v. Hill, 14 Ind. 131.....431	
Brown v. Wood, 6 Rich. Eq. 155...602	Cook v. Adams, 1 Bosw. 497.....300	
Bruce v. Schuyler, 4 Gilman, 221...381	Cooper v. Williams, 4 Ohio, 253...375	
Buchan v. Sumner, 2 Barb. Ch. 165.509	Corby v. Hill, 4 C. B., N. s. 556...250	
Buckley v. Buckley, 11 Barb. 44...509	Corby v. Hill, 27 L. J. C. P. 318...250	
Buntin v. Rose, 16 Ind. 209.....207	Cordell v. The State, 22 Ind. 1.....381	
Burk v. Howard, 15 Ind. 219.....535	Corfield v. Coryell, 4 Wash. C. C. 371.....71	
Burroughs v. The Housatonic R. R. Co., 2 Am. R. Cas. 35.....241	Cornell v. Vanartsdalen, 4 Pa. St. 364.....444	
Burson v. Blair, 12 Ind. 371.....395	Covington, etc., Co. v. Moore, 3 Ind. 510.....178	
Burt v. Hoettinger, 28 Ind. 214.....535	Cowden v. Kerr, 6 Blackf. 280..... 41	
Burton v. Burton, 28 Ind. 342.....362	Cowley v. The Grand Rapids, etc., R. R. Co., 13 Ind. 61.....431	
Bush v. Brainard, 1 Cowen, 78250	Craig v. Mayor, etc., 53 Pa. St. 477.376	
Butterfield v. Forrester, 11 East, 60. 68	Cresinger v. Lessee of Welch, 15 Ohio, 156.....597	
Byers v. The State, ex rel. Hutchison, 20 Ind. 47.....280	Cross v. Truesdale, 28 Ind. 44.....492	
C		
Caffrey v. Dudgeon, 38 Ind. 512....537	Crouse v. Holman, 19 Ind. 30.....403	
Campbell v. Murphy, 2 Jones Eq. 357602	Crowell v. The City of Peru, 41 Ind. 308.....308	
Carder v. The Board of Comm'rs of Fayette Co., 16 Ohio St. 353.....214	Cruzan v. Smith, 41 Ind. 288.....269	
Carhart v. Auburn Gas Light Co., 22 Barb. 297.....240	Curran v. Curran, 40 Ind. 473.....190	
Carpenter v. Dane, 10 Ind. 125....444	D	
Catlett v. Gilbert, 23 Ind. 614...23, 157	Daggy v. Coats, 19 Ind. 259.....485	
Chambers v. City of St. Louis, 29 Mo. 543.....215	Dalton v. Denton, 1 C. B., N. s. 672. 45	
Chase v. Dwinal, 7 Greenl. 134....325	Daniel v. Hollingshead, 16 Ga. 190.602	
Cheek v. Glass, 3 Ind. 286..... 64	Davis v. Calloway, 30 Ind. 112.....492	
Cheek v. Morton, 2 Ind. 321.....115	Day v. Patterson, 18 Ind. 114.....491	
Chicago, etc., R. R. Co. v. Hazzard, 26 Ill. 373.....499	Dean v. Phillips, 17 Ind. 406.....509	
City of Indianapolis v. Patterson, 33 Ind. 157.....225	Deason v. Boyd, 1 Dana, 46.....598	
City of Logansport v. Wright, 25 Ind. 512.....157, 265	Dequindre v. Williams, 31 Ind. 444.521, 564	
Clarke v. Featherston, 32 Ind. 142..462	De Varaigne v. Fox, 2 Blatchf. C. C. 95.....374	
Clem v. Martin, 34 Ind. 341206	Devol v. McIntosh, 23 Ind. 529.....492	
Clinton v. Strong, 9 Johns. 370.....325	Dickerson v. Turner, 12 Ind. 223...195	
Cloud v. Moorman, 18 Ind. 40.....491	Dingley v. City of Boston, 100 Mass. 544.....375	
Cloud v. Webb, 3 Dev. 317.....598	Dodd v. Holme, 1 Ad. & E. 493...251	
	Doe v. Abernathy, 7 Blackf. 442...599	
	Doe v. Harvey, 3 Ind. 104.....564	

TABLE OF CASES CITED.

xiii

Doe v. Hildreth, 2 Ind. 274.....	41
Doe v. Horn, 1 Ind. 363.....	459
Doe v. Makepeace, 8 Blackf. 575-337,	550
Doe v. Owen, 2 Blackf. 452.....	555
Drake v. Ramsey, 5 Ohio, 252.....	596
Dublin, etc., R. W. Co. v. Black,	
16 Eng. Law & Eq. 556.....	599
Dugan v. Sprague, 2 Ind. 600.....	208
Dunning v. Roberts, 35 Barb. 463-300	
Dutton v. Strong, 1 Black, 25.....	43

E

Eagan v. Fitchburg R. R. Co., 101	
Mass. 315.....	254
East Haven v. Hemingway, 7 Conn.	
186.....	43
Eddy v. Herrin, 17 Maine, 338.....	321
Edgerton v. Huff, 26 Ind. 35.....	385
Edwards v. Schaffer, 49 Barb. 291-298	
Elliott v. Wright, 7 Ind. 374.....	157
Ellston v. Scott, 19 Ind. 290.....	491
Embury v. Conner, 3 Const. 511.....	371
Ensminger v. The People, etc., 47	
Ill. 384.....	41
Etchison Ditching Ass'n v. Hillis,	
40 Ind. 408.....	143
Eubanks v. Peak, 2 Bailey, 497.....	598
Evansville, etc., R. R. Co. v. Coch-	
ran, 10 Ind. 560.....	258
Evansville, etc., R. R. Co. v. Dex-	
ter, 24 Ind. 411.....	67, 271
Evansville, etc., R. R. Co. v. Dun-	
can, 28 Ind. 441.....	66
Evansville, etc., R. R. Co. v. Fitz-	
patrick, 10 Ind. 120.....	482
Evansville, etc., R. R. Co. v. Hiatt,	
17 Ind. 102.....	271
Evansville, etc., R. R. Co. v. Mil-	
ler, 30 Ind. 209.....	485
Excelsior Draining Co. v. Brown,	
38 Ind. 384.....	394

F

Falkenburgh v. Jones, 5 Ind. 296.....	449
Fankboner v. Fankboner, 20 Ind.	
62.....	441
Farbach v. The State, 24 Ind. 77.....	164
Farlow v. Kemp, 7 Blackf. 544.....	491
Farmers, etc., Bank v. Butchers,	
etc., Bank, 4 Kern. 623.....	300
Farmers, etc., Bank v. Butchers,	
etc., Bank, 2 E. P. Smith, 125.....	300
Fellows v. School District No. 8 in	
Fayette, 39 Me. 559.....	321
Fero v. The Buffalo, etc., R. R. Co.,	
22 N. Y. 209.....	242
Fetrow v. Wiseman, 40 Ind. 148.....	595

Fetters v. The Muncie Nat'l Bank,	
34 Ind. 251.....	486
Field v. The New York Central R.	
R., 32 N. Y. 339.....	239
Fisher v. Ewing, 30 Ind. 130.....	549
Fleming v. Fleming, 8 Blackf. 234-435	
Fleming v. Potter, 14 Ind. 486.....	562
Fleming v. Stout, 19 Ind. 328.....	130
Fletcher v. Holmes, 32 Ind. 497.....	510
Flournoy v. The City of Jefferson-	
ville, 17 Ind. 169.....	287
Ford v. The Chicago, etc., R. R.	
Co., 14 Wis. 609.....	371
Foshay v. Ferguson, 5 Hill N. Y.	
154.....	321
Franklyn v. Reeves, Cas. temp.	
Hardw. 118.....	555
Frazier v. Williams, 18 Ind. 416.....	132
Fremantle v. London, etc., R. W.	
Co., 10 C. B., N. S. 89.....	241
Fremantle v. London, etc., R. W.	
Co., 31 Law J. C. P. 12.....	241
Fremantle v. London, etc., R. W.	
Co., 2 F. & F. 337.....	241
Frenzel v. Miller, 37 Ind. 1.....	492
Fultz v. Wycoff, 25 Ind. 321.....	199

G

Gagg v. Vetter, 41 Ind. 228.....	259
Gallagher v. Humphrey, 6 Law	
Times, 684.....	250
Gallettley v. Barrackman, 12 Ind.	
379.....	173
Galloway v. The State, 29 Ind. 442.....	57
Gano v. Gilruth, 4 Greene Iowa, 453-602	
Garrigus v. The B'd of Comm'rs of	
Parke Co., 39 Ind. 66.....	504
Gatling v. Newell, 12 Ind. 116.....	555
Gautret v. Egerton, 36 L. J. C. P.	
191.....	250
Gentile v. The State, 29 Ind. 409.....	41
Gerrard v. Johnson, 12 Ind. 636.....	564
Gillespie v. Broas, 23 Barb. 370.....	387
Gilmore v. Hempstead, 4 How. Pr.	
153.....	81
Goodenow v. Buttrick, 7 Mass. 142-382	
Gott v. Mitchell, 7 Blackf. 270.....	201
Grant v. The City of Davenport, 18	
Iowa, 179.....	43
Giantman v. Thrall, 44 Barb. 173.....	169
Gray v. Kendall, 5 Bosw. 666.....	80
Greenleaf v. The Illinois, etc., R.	
R. Co., 29 Iowa, 14.....	254
Greensburgh, etc., Turnpike Co. v.	
Sidener, 40 Ind. 424.....	143
Griffin v. Griffin, 10 Ind. 170.....	399
Griggs v. Voorhies, 7 Blackf. 561.....	58
Grimes v. Duzan, 32 Ind. 361.....	293
Groucott v. Williams, 4 Best. & S.	
149.....	250

Groucott v. Williams, 32 L. J. Q. B.
237.....250
Gulick v. New, 14 Ind. 93.....578

H

Haldeman v. Pennsylvania Central
R. R., 50 Pa. St. 425.....374
Hale v. Plummer, 6 Ind. 121.....509
Hall v. Palmer, 18 Ind. 5.....130
Hamrick v. The Danville, etc., G.
R. Co., 30 Ind. 147.....171
Hamrick v. The Danville, etc., G.
R. Co., 32 Ind. 347.....171
Hanna v. Shields, 34 Ind. 84.....186
Hanna v. The Jeffersonville R. R.
Co., 32 Ind. 113.....62
Hardcastle v. The South Yorkshire
R. W. Co., 4 H. & N. 67.....250
Hardcastle v. The South Yorkshire
R. W. Co., 28 L. J. Exch. 137...250
Hardwick v. The Danville, etc., G.
R. Co., 33 Ind. 321.....85
Hartman v. Kendall, 4 Ind. 403.....599
Hasselback v. Sinton, 17 Ind. 545...548
Hatch v. Cincinnati, etc., R. R.
Co., 18 Ohio St. 92.....375
Hatch v. Taylor, 10 N. H. 538...140
Haun v. The Mulberry, etc., G. R.
Co., 33 Ind. 103.....196
Hegeman v. The Western R. R.
Cor., 3 Kern. 9.....243
Henton v. Beeler, 7 Blackf. 150...284
Hewey v. Nourse, 54 Me. 256.....251
Heyward v. The Mayor, etc., 7 N.
Y. 14.....373
Heyward v. The Mayor, etc., 8
Barb. 486.....387
Higgins v. Willis, 35 Ind. 371.....434
Hill v. Brinkley, 10 Ind. 102...392, 568
Hillis v. Wilson, 13 Ind. 146.....431
Holland v. Fuller, 13 Ind. 195.....509
Holland v. Hatch, 11 Ind. 497.....161
Holliday v. Spencer, 7 Ind. 632...562
Holmes v. Blogg, 8 Taunt. 35.....599
Honore's Ex'r v. Bakewell, 6 B.
Mon. 67.....34
Hopkins v. The Greensburg, etc.,
Turnpike Co., 40 Ind. 44.....82
Hopps v. The People, 31 Ill. 385...103
Horner v. Doe, 1 Ind. 130.....564
Horton v. Wilson, 25 Ind. 316...549
Hounsell v. Smyth, 7 C. B., N. S. 731.250
Hounsell v. Smyth, 29 L. J. C. P.
203.....250
Howard v. Shoemaker, 35 Ind. 111...576
Howe v. Walker, 4 Gray, 318.....89
Howk v. Mcloy, 26 Ind. 176.....568
Howland v. Vincent, 10 Met. 371...250
Hubbard v. Chappel, 14 Ind. 601...186

Hubler v. Taylor, 20 Ind. 446.....115
Huff v. Gilbert, 4 Blackf. 19...337, 550
Halbert v. Young, 13 How. Pr.
413.....169
Hume v. Dessar, 29 Ind. 112.....186
Hunt v. Standart, 15 Ind. 33.160

I

Igoe v. The State, 14 Ind. 239..... 5
Illinois Central R. R. Co. v. Mc-
Clelland, 42 Ill. 355.....242
In re Moore, 63 N. C. 397.....465
In re New York, etc., Co. v. Kip.
46 N. Y. 546.....387
In re Peter Townsend, 39 N. Y.
171.....387
In re The Water Comm'rs v. Law-
rence, 3 Edw. Ch. 552.....375
Indiana Central R. R. Co. v. Hun-
ter, 8 Ind. 74.....265
Indianapolis, etc., R. R. Co. v.
Jones, 29 Ind. 465.....60
Indianapolis, etc., R. R. Co. v.
Keeley's Adm'r, 23 Ind. 133-76, 271
Indianapolis, etc., R. R. Co. v.
Paramore, 31 Ind. 143.....68
Indianapolis, etc., R. R. Co. v. Rob-
inson, 35 Ind. 380.....197
Indianapolis Ins. Co. v. Mason, 11
Ind. 171.....293
Indianapolis Piano Manufacturing
Co. v. First National Bank of
Indianapolis, 33 Ind. 302.....123
Inhabitants of Whitefield v. Long-
fellow, 13 Me. 146.....321
Irving v. Wilson, 4 T. R. 485.....326
Irvinson v. Van Riper, 34 Ind. 148.455
Israel v The State, 8 Ind. 467.....449

J

Jack v. Russey, 8 Ind. 180.....444
Jackson v. Bard, 4 Johns. 230.....444
Jackson v. Burchin, 14 Johns. 124...596
Jackson v. Carpenter, 11 Johns. 539.596
Jackson v. Crawfords, 12 Wend. 533.564
Jackson v. Robinson, 4 Wend. 436..564
Jackson v. Van Dusen, 5 Johns. 144.444
James v. Hays, 34 Ind. 272.....185
Jaqua v. Montgomery, 33 Ind. 36...492
Jeffersonville, etc., R. R. Co. v.
Bowen, 40 Ind. 545.....258
Jeffersonville, etc., R. R. Co. v. Hend-
ricks' Adm'r, 26 Ind. 228.....50, 271
Jeffrey v. Bigelow, 13 Wend. 518...297
Jenkins v. Bodley, Sm. & M. Ch.
338.....602
Jenkins v. Little Miami R. R. Co.,
2 Disney, 49.....254

TABLE OF CASES CITED.

xv

Johnson v. Kent, 9 Ind. 252.....192
Johnson v. The Hudson River R.
R. Co., 20 N. Y. 65.....242
Johnson v. Tutewiler, 35 Ind. 353...434
Jones v. Droneberger, 23 Ind. 74...535
Jones v. Van Patten, 3 Ind. 107...555
Justice v. The Board of Justices of
Vermillion Co., 2 Blackf. 149....167

K

Kane v. The Mayor, etc., 15 Md.
240.....372
Keightly v. Walls, 24 Ind. 205.....568
Keightly v. Walls, 27 Ind. 384.....569
Kelsey v. Barney, 2 Kern. 425242
Kendall v. Lawrence, 22 Pick. 540...595
Kennedy v. The State, 37 Ind. 355...553
Kern v. Hazlerigg, 11 Ind. 443...34,395
Kimble v. The White Water Valley
Canal Co., 1 Ind. 285.....389
King v. Smith, 2 M. & S. 406.....579
Kiser v. Ruddick, 8 Blackf. 382....208
Kistner v. Sindlinger, 33 Ind. 114...509
Kline v. Beebe, 6 Conn. 494.....598
Knour v. Dick, 14 Ind. 20.....192

L

Lamb v. Donovan, 19 Ind. 40.....491
Lamson v. Falls, 6 Ind. 309.....64
Langsdale v. Mills, 32 Ind. 380....401
Lapham v. Curtis, 5 Vt. 371.....237
Larowe v. Beam, 10 Ohio, 498.....602
Laughery v. McLean, 14 Ind. 106...185
Leazure v. Hillegas, 7 S. & R. 313.215
Lee v. Riley, 18 C. B., N. S. 722...250
Lee v. Riley, 34 L. J. C. P. 212...250
Lefel v. Lefel, 35 Ind. 76.....336
Lessee of Blanchard v. Porter, 11
Ohio, 138.....41
Lewis v. Lewis, 30 Ind. 257.....14
Leyner v. The State, 8 Ind. 490....549
Linville v. Earlywine, 4 Blackf. 469...169
Little v. Vance, 14 Ind. 19.....431
Livesey v. Livesey, 30 Ind. 398....417
Livingood v. Livingood, 6 Blackf.
268.....550
Louden v. Birt, 4 Ind. 566.....198
Lower v. Wallick, 25 Ind. 68.....280
Luirance v. Luirance, 32 Ind. 198...268
Lyon v. Perry, 14 Ind. 515.....435
Lytle v. Lytle, 37 Ind. 281.....394

M

Madison, etc., R. R. Co. v. Taffe,
37 Ind. 361.....259
Maiden v. Webster, 30 Ind. 317...125
Malady v. McNary, 30 Ind. 273...262

Maloy v. The New York Central
R. R. Co., 58 Barb. 182.....254
Manning v. Gasharie, 27 Ind. 399...299
Marlett v. Wilson's Ex'r, 30 Ind.
240.....492
Markham v. Merrett, 7 How. Miss.
437.....600
Martin v. Starr, 7 Ind. 224.....563
Martin v. The City of Evansville,
32 Ind. 85.....41
Martindale v. Martindale, 10 Ind.
566.....381
Mason v. Weston, 29 Ind. 561.....462
Mathews v. Ritenour, 31 Ind. 31...492
Matlock v. Matlock, 5 Ind. 403...509
Matlock v. Todd, 25 Ind. 128.....62
Maxwell v. Griswold, 10 How. U.
S. 242.....325
McClure v. Jeffrey, 8 Ind. 79.....90
McDade v. McDade, 29 Ind. 340...308
McEwen v. Gilker, 38 Ind. 233....406
McGuire v. Maloney, 1 B. Mon. 224...443
McMahon v. Cincinnati, etc., Co.,
5 Ind. 413.....388
McManus v. Carmichael, 3 Iowa, 1...41
McSheely v. Bentley, 31 Ind. 235...123
M'Intire v. The State, 5 Blackf.
384.....385
Mechanics' Bank v. New York, etc.,
R. R. Co., 13 N. Y. 599.....140
Medler v. Hiatt, 14 Ind. 405.....439
Medlicott v. O'Donel, 1 Ball & B.
171.....602
Menifee v. Clark, 35 Ind. 304.....431
Merritt v. Cobb, 17 Ind. 314.....549
Meyer v. Yesser, 32 Ind. 294.....206
Miles v. Buchanan, 36 Ind. 490...548
Miles v. Lingeran, 24 Ind. 385...596
Mills v. Carter, 8 Blackf. 203.....585
Mills v. Simmonds, 10 Ind. 464...550
Moberry v. The City of Jeffersop-
ville, 38 Ind. 198.....153, 406
Morrison v. Thurman, 17 B. Mon.
249.....43
Morse v. Morse, 25 Ind. 156.....481
Moses v. Macferlan, 2 Bur. 1005...324
Munn v. Com'n Co., 15 Johns. 44...297
Murdock v. Ford, 17 Ind. 52.....403
Murphy v. Tilly, 11 Ind. 511.....549
Musselman v. Kent, 33 Ind. 452...142
Myerson v. Neff, 5 Ind. 523.....293

N

Nazro v. Fuller, 24 Wend. 374.....160
Nelson v. Johnson, 18 Ind. 329...130
New Albany, etc., R. R. Co. v.
Pickens, 5 Ind. 247.....178
Newcastle, etc., R. R. Co. v. Peru,
etc., R. R. Co., 3 Ind. 464.....376

New England Fire, etc., Ins. Co. v. Robinson, 25 Ind. 536.....	6	Pilcher v. Flinn, 30 Ind. 202.....	347
Nicholson v. Carr, 3 Blackf. 104.....	167	Pitcher v. Laycock, 7 Ind. 398.....	600
Nicoll v. The New York, etc., R. Co., 2 Kern. 121.....	387	Pittsburg, etc., R. W. Co. v. Gilleland, 56 Pa. St. 445.....	237
Nicoll v. The New York, etc., R. Co., 12 Barb. 460.....	387	Plitt v. Cox, 43 Pa. St. 486.....	389
Nightingale v. Withington, 15 Mass. 272.....	595	Potter v. Smith, 36 Ind. 231, 347, 492, 599	
Nill v. Comparet, 16 Ind. 107.....	362	Potter v. Stiles, 32 Ind. 318.....	549
Nolte v. Libbert, 34 Ind. 163.....	345	President, etc., Co. v. The City of Indianapolis, 12 Ind. 620.....	387
Norris v. Crocker, 13 How. U. S. 429.....	383	Preston v. The City of Boston, 12 Pick. 7.....	321
North Branch Canal Co. v. Hireen, 44 Pa. St. 418.....	389	Prewitt v. Graves, 5 J. J. Mar. 114.....	598
North River Bank v. Aymar, 3 Hill N. Y. 263.....	300	Price v. The Grand Rapids, etc., R. R. Co., 13 Ind. 58.....	431
Norway Plains Co. v. Boston, etc., R. R., 1 Gray, 263.....	246	Priest v. Cummings, 16 Wend. 617.....	598
O		Q	
O'Daily v. Morris, 31 Ind. 111.....	434	Quick v. Goodwin, 19 Ind. 438.....	130
Ohio, etc., R. R. Co. v. Hays, 35 Ind. 173.....	336	R	
Oiler v. Gard, 23 Ind. 212.....	90	Railroad Co. v. Schurmeir, 7 Wal. 272.....	41
Oldham v. Sale, 1 B. Mon. 76.....	598	Rankin v. Oliphant, 9 Mo. 239.....	602
Oliver v. Haudlet, 13 Mass. 237.....	595	Rathbun v. Payne, 19 Wend. 399.....	68
P		Redman v. The State, 28 Ind. 205.	56
Paine v. The Lake Erie & L. R. R. Co., 31 Ind. 283.....	61	Reese v. Beck, 9 Ind. 238.....	399
Patterson v. Blake, 12 Ind. 436.....	509	Reveal v. Conner, 21 Ind. 289.....	166
Pattison v. Vaughan, 40 Ind. 253.....	455	Rexford v. Knight, 1 Kern. 308.....	374
Peacock v. Albin, 39 Ind. 25...263, 531		Rexford v. Knight, 15 Barb. 627.....	387
Peck v. Martin, 17 Ind. 115.....	167	Reynolds v. Kenyon, 43 Barb. 585.....	300
Peden's Adm'r v. King, 30 Ind. 181.....	293	Rice v. Ruddiman, 10 Mich. 125.....	43
Pennington v. Nave, 15 Ind. 323.....	64	Richardson v. Boright, 9 Vt. 368.....	599
Pennsylvania Canal Co. v. Bentley, 66 Pa. St. 30.....	254	Ridgway v. Newbold, 1 Harring. Del. 385.....	602
People v. Few, 2 Johns. 290.....	465	Rineman v. The State, 24 Ind. 80.....	164
People v. Hayden, 6 Hill N. Y. 359.....	389	Riser v. Snoddy, 7 Ind. 442.....	168, 562
People v. Kerr, 27 N. Y. 188.....	387	Ripley v. Gelston, 9 Johns. 201.....	324
People v. Smith, 21 N. Y. 595.....	371	Rising Sun, etc., Turnpike Co. v. McCollum, 7 Ind. 677.....	169
People v. The Canal Appraisers, 33 N. Y. 461.....	41	Rising Sun Ins. Co. v. Slaughter, 20 Ind. 520.....	3
Perkins v. Rogers, 35 Ind. 124.....	62	Ritenour v. Mathews, 34 Ind. 279.....	492
Peru, etc., R. R. Co. v. Hasket, 10 Ind. 409.....	332	Robbins v. Eaton, 10 N. H. 561.....	598
Phillips v. Green, 3 A. K. Mar. 7.....	598	Robbins v. The Sand Creek Turnpike Co., 34 Ind. 461.....	80
Phillips v. Green, 5 T. B. Mon. 345.....	598	Roberts v. McCarty, 9 Ind. 16.....	509
Pigeon Creek Draining Ass'n v. Lagrange, 41 Ind. 272.....	275	Roberts v. Smith, 34 Ind. 550.....	336
Piggot v. Eastern Counties R. W. Co., 3 C. B. 229.....	241	Robertson v. Bergen, 10 Ind. 402.....	132
Piggot v. Eastern Counties R. W. Co., 10 Jur. 571.....	257	Robinson v. Bates, 3 Met. 40.....	602
		Robinson v. Cone, 22 Vt. 213.....	68
		Rockwood v. Wilson, 11 Cush. 221.....	240
		Rogers v. Hurd, 4 Day, 57.....	596
		Rogers v. Place, 29 Ind. 577.....	186
		Rogers v. Seale, 2 Freem. 84.....	602
		Roof v. Stafford, 7 Cow. 179.....	600
		Ross v. Boston, etc., R. R. Co., 6 Allen, 87.....	257
		Rosser v. Barnes, 16 Ind. 502.....	207

TABLE OF CASES CITED.

xvii

Round v. The State, 14 Ind. 493...549
 Ruffing v. Tilton, 12 Ind. 259.....173
 Ruse v. The Mut. Benefit Life Ins.
 Co., 23 N. Y. 516.....118
 Rush's Adm'r v. The State, 20
 Ind. 432.....435
 Ryan v. The New York Central R.
 R. Co., 35 N. Y. 210.....237

S

St. John v. The American Mut. Life
 Ins. Co., 13 N. Y. 31.....119
 Salmon v. Brown, 6 Blackf. 347...491
 Salmon v. Cutts, 5 Eng. Law & Eq.
 93.....599
 Sammons v. Newman, 27 Ind. 508..157
 Sample v. Rowe, 24 Ind. 208.....403
 Sanford v. McLean, 3 Paige, 117...599
 Saunders v. Hendrix, 5 Ala. 224...444
 Saunders v. Melhuish, 6 Mod. 73...465
 Schaffer v. Fithian, 17 Ind. 463...509
 Schmitz v. Lawferty, 29 Ind. 400...293
 Scoville v. Chapman, 17 Ind. 470...439
 Seawright v. Coffman, 24 Ind. 414...462
 Shaw v. Boyd, 5 S. & R. 309.....600
 Shaw v. Woodcock, 7 B. & C. 73-324
 Shaw v. Woodcock, 14 Eng. Com.
 Law, 18.....324
 Sheldon v. The Hudson River R.
 R. Co., 14 N. Y. 218.....257
 Sherry v. Foresman, 6 Blackf. 56...156
 Shirley v. Hagar, 3 Blackf. 225...169
 Shroyer v. Lawrence, 9 Ind. 322...399
 Shucraft v. Davidson, 19 Ind. 98...491
 Simkins v. Malatt, 9 Ind. 543.....477
 Simpson v. Hand, 6 Whart. 311.... 68
 Simpson v. Pearson, 31 Ind. 1.....562
 Sims v. Parks, 32 Ind. 363.....115
 Sims v. Ricketts, 35 Ind. 181.....340
 Singleton's Devises v. Singleton's
 Heirs, 8 Dana, 315.....444
 Skillen v. Skillen, 41 Ind. 260.....123
 Slevin v. Morrow, 4 Ind. 425.....208
 Smith v. Jeffries, 25 Ind. 376.....293
 Smith v. Lisher, 23 Ind. 500.....553
 Snowden v. Wilas, 19 Ind. 10.....199
 Snyder v. White, 15 Ind. 101.....157
 Songer v. Walker, 1 Blackf. 251...555
 Sowle v. Champion, 16 Ind. 165... 23
 Spaulding v. Baldwin, 31 Ind. 376..564
 Spears v. Clark, 6 Blackf. 167-337,550
 Spencer v. Russell, 9 Ind. 157.....293
 Spencer v. The State, 5 Ind. 41....381
 Spider v. James, 32 Ind. 202.....161
 Staffordshire, etc., Co. v. The Birm-
 ingham, etc., Co., 35 L. J. (N.
 s.) Ch. 757.....390
 Stanley v. Chappell, 8 Cow. 235...169
 Stapp v. Spurlin, 32 Ind. 442.....299

Starin v. The Town of Genoa, 23
 N. Y. 441.....247
 Starkey v. Neese, 30 Ind. 222.....185
 State v. Beackmo, 8 Blackf. 246...389
 State v. Digby, 5 Blackf. 543.....389
 State v. Pearce, 14 Ind. 426.....555
 State v. The Bethlehem, etc., G. R.
 Co., 32 Ind. 357.....152
 State v. Vawter, 7 Blackf. 592.....305
 State Bank v. Brooks, 4 Blackf. 485..550
 State Bank v. Tweedy, 8 Blackf.
 447.....402
 State, ex rel. Allen, v. Sherill, 34
 Ind. 57.....403
 State, ex rel. Billman, v. Hamilton,
 33 Ind. 502.....281
 State, ex rel. Sharpe, v. Banks, 25
 Ind. 495.....105
 Steamboat Magnolia v. Marshall,
 39 Miss. 109..... 41
 Steamboat New World v. King,
 16 How. U. S. 469.....252
 Stevens v. Parish, 29 Ind. 260...434,542
 Stevens v. The Patterson, etc., R. R.
 Co., 34 N. J. 532.....41
 Stevens v. Warren, 101 Mass. 564..119
 Stevenson v. Mortimer, Cowper,
 805.....324
 Stewart v. Rankin, 39 Ind. 161,337,545
 Stinson v. Butler, 4 Blackf. 285.... 41
 Stinson v. Sumner, 9 Mass. 138...602
 Stockwell v. Byrne, 22 Ind. 6.....157
 Sturgis v. Rogers, 26 Ind. 1.....535
 Suydam v. Hoyt, 1 Dutcher, 230...395
 Suydam v. Hoyt, 1 N. S. Law Rep.
 H. L. 254.390
 Swain v. Morberly, 17 Ind. 99.285

T

Taylor v. Fletcher, 15 Ind. 80.....549
 Taylor v. Perry, 5 Blackf. 599.....284
 Taylor v. The Atlantic Mut. Ins.
 Co., 37 N. Y. 275..... 45
 Teall v. Barton, 40 Barb. 137251
 Terre Haute, etc., R. R. Co. v. Mc-
 Kinley, 33 Ind. 274.....244
 Terre Haute, etc., R. R. Co. v. Nor-
 man, 22 Ind. 63.....185
 Thomas v. Gammel, 6 Leigh, 9....599
 Thomas v. White, 11 Ind. 132..... 64
 Thomas's Lessee v. Cummins, 1
 Yeates, 40.....465
 Thompson v. Mills, 39 Ind. 528...340
 Tilford v. Roberts, 8 Ind. 254.....198
 Tomlinson v. Hamilton, 27 Ind. 139,167
 Tourtellot v. Rosebrook, 11 Met.
 460.....251
 Train v. Gridley, 36 Ind. 241...308,455
 Trew v. Gaskill, 10 Ind. 265.....477

Statutes of Indiana, Vol. 3 (Davis' Supplement), cited as Ind. Stat.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, NOVEMBER TERM, 1872, IN THE FIFTY-
SEVENTH YEAR OF THE STATE.

HOFFMAN v. BANKS.

FOREIGN INSURANCE COMPANIES.—*Statutes of 1852 and 1865.*—*Premium Note Void.*—The act of December, 1865, relating to foreign insurance companies, was intended as a substitute for the act of 1852, so far as the latter act related to such companies; and when the provisions of the act of 1865 are complied with, and the auditor of state issues his certificate authorizing the agent to act as such, his authority as agent is complete. Where a premium note was given for a policy in a foreign company, which had not complied with the law, and no certificate had been issued to the agent receiving the note, it was *held* that the note was void.

41	1
184	219

APPEAL from the Lake Circuit Court.

OSBORN, J.—On the 29th day of April, 1870, the appellant executed his promissory note, payable five months after date, to the appellee, for twenty-five dollars and twenty cents. Suit was instituted upon the note before a justice of the peace, and judgment rendered against the maker. He appealed to the circuit court. In that court there was a trial,

Hoffman v. Banks.

and finding for the appellee for the amount of the note and interest. Motion for a new trial overruled, exceptions, and judgment on the finding.

The ground of the motion for a new trial was, that the finding was contrary to the evidence; and the error assigned is, that the court erred in overruling that motion.

The evidence is all set out in the bill of exceptions, and as the testimony of the appellant is brief, we state it, as follows:

"I executed the above note; I gave said note for life insurance in the World Mutual Life Insurance Company, of New York; I gave the note as payment of first premium of twenty-five dollars to said World Mutual Life Insurance Company of New York; I was insured for one thousand dollars; I gave the note to C. W. Banks; he was the agent of the company; I gave the said note at the time I made application for insurance; I did not notice at the time whether the note was made to the insurance company or C. W. Banks, the agent; I supposed it was running to the company; I made application for insurance to C. W. Banks, the agent; I gave C. W. Banks, the agent, no power or authority to pay in advance any money for me to the insurance company; if he did advance any money for me to the company on that note, he did so on his own authority and responsibility; I don't know whether the company got the twenty-five dollars or not; I got my policy from the company in May, 1870; I offered the policy to Banks the last time he was out here—some time in the fall of 1870—and told him I would pay the survey fee and the examining surgeon's fee; he did not do so."

The clerk of the court testified that no statement of the company was on file in his office on the day of the date of the note, and none filed on the first day of January, 1870; and no power of attorney, or statement of any kind, of the company, on file in his office between the 1st day of January and the 29th day of April, 1870.

A certificate of the auditor of state was introduced, bear-

ing date December 22d, 1870, reciting that the company had filed in his office the statement required under the act of the General Assembly of December 21st, 1865 (3 Ind. Stat. 312), and stating, amongst other things, that the statement showed the condition of the company on the 1st day of July, 1870, and that R. H. Wells was authorized, by a written instrument duly executed by the company, to act as agent for the company for Lake county, to acknowledge service of process for and on behalf of the company, and consenting that such service should be taken and held to be as valid as if served upon the company, and waiving all errors by reason of such service; and Wells is thereby authorized to transact the business of insurance as agent of the company.

The policy of insurance was not in court, but the defendant admitted that he received it; that it was in the usual form, signed by the president and countersigned by the secretary of the company; and showed the receipt of the twenty-five dollars premium.

The appellee offered no other evidence than the note, which purported to be made at "Crown Point, Indiana."

The main point in the case, and the only one that we consider it necessary to decide, strikes at the validity of the note. It will be seen, by a reference to the evidence, that the note was dated in April; that the policy of insurance was issued in May; that the statement of the company could not have been filed with the auditor prior to the 1st day of July, because it showed the condition of the company on that day; and that the authority to Wells to act as agent was given by the auditor on the 22d day of December. No such authority was ever given to the appellee to act as such agent.

In *The Rising Sun Insurance Co. v. Slaughter*, 20 Ind. 520, this court held that the act respecting foreign corporations, etc., approved June 17th, 1852 (1 G. & H. 272), included foreign insurance corporations; and that a policy issued by a foreign company under a contract therefor, entered into in this State by one assuming to act as the agent for the com-

pany, and holding himself out as such, without having first complied with the requirements of the law, was void.

The first section of that act provides, "that agents of corporations, not incorporated or organized in this State, before entering upon the duties of their agency in this State, shall deposit in the clerk's office of the county where they purpose doing business therefor, the power of attorney, commission, appointment, or other authority under or by virtue of which they act as agents."

The second section relates to filing a resolution, etc., of the company authorizing suits to be brought against them in the courts of this State, and for service of process on their agents.

The fourth section provides, that "such foreign corporations shall not enforce in any of the courts of this State, any contracts made by their agents or persons assuming to act as their agents before a compliance by such agents, or persons acting as such, with the provisions of sections 1 and 2 of this act."

By the 1st section of an act of the General Assembly of this State, approved December 21st, 1865 (3 Ind. Stat. 312), it is enacted, "that it shall not be lawful for any agent or agents of any insurance company incorporated by any other state than the State of Indiana, directly or indirectly, to take risks or transact any business of insurance in this State, without first producing a certificate of authority from the auditor of state." It then prescribes what shall be done to authorize the auditor to issue his certificate.

Section 7 provides, that "any person or persons violating the provisions of this act, shall, upon conviction thereof, in any court of competent jurisdiction, be fined, in any sum not exceeding one thousand dollars, or imprisonment in the county jail not more than thirty days, or both, at the discretion of the court."

Counsel for the appellant contend that the provisions of both acts apply to foreign insurance companies, and that

such companies must comply with the requirements of both, before their agents can legally transact business for them.

At the session of the legislature at which the act in relation to foreign corporations was passed, the legislature also passed an act for the incorporation of insurance companies, etc. In that act was included a section in relation to foreign insurance companies, relative to their agencies, and what must be done before the agent could act as such. That section was pronounced invalid by this court, on the ground that it was unconstitutional. *Igoe v. The State*, 14 Ind. 239.

In the case of *The Rising Sun Insurance Co. v. Slaughter*, *supra*, it was contended that the legislature did not intend to include foreign insurance companies in the act in relation to foreign corporations, because it had made other provisions relative to them by another act; but the court held, "that an attempt to show that the subject-matter of legislation, evidently included in the terms thereof, had been the subject of other, but unconstitutional, action, should not be permitted."

That decision was made in May, 1863. In December, 1865, the act regulating foreign insurance companies, etc., was passed. By the provisions of that act, the acts required of the companies were entirely different from those required by the act in relation to foreign corporations. The statement was required to be filed in the office of the auditor of state, who was to issue certificates of authority to the agents. By section 3, he was to have a fee of five dollars in each case for the examination of the statement and investigation of the evidences of investment, and two dollars for each certificate of authority issued under the provisions of the act, to be paid by the agent or agents applying for the same. Section 5 declares that all papers required by the act to be deposited in the office of the auditor, certified under the hand of such auditor to be true copies of such papers, shall be received as evidence in all courts and places, the same as the originals.

Section 1 of the act of 1865 confers power upon the audi-

Hoffman v. Banks.

tor to issue a certificate of authority to an agent to act as such, and section 3 fixes the fee for it.

We think that act was intended by the legislature as a substitute for the act of 1852, so far as the latter related to foreign insurance companies, and that when the provisions of the act of 1865 are complied with, and the auditor of state issues his certificate authorizing the agent to act as such, such certificate will be a sufficient authority for him to legally transact business for the company.

At the time of the execution of the note in this case and the delivery of the policy, the auditor had not issued a certificate authorizing Banks, or any one else, to act as the agent of the company in Lake county, nor had the company filed with the auditor any statement, as required by the act of 1865, or in any manner complied with its requirements; and that brings us to the question of the validity of the note.

The appellee contends that as long as the appellant holds the policy, it is unjust for him to refuse to pay the note. He thinks the policy valid, and that therefore the note is also valid; and we are referred to 25 Ind. 536, as practically overruling 20 Ind. 520.

The action in 25 Ind., *supra*, was instituted to recover upon an agreement to insure. The complaint was silent as to whether the agent of the company with whom the agreement was made had complied with the requirements of the law or not. A demurrer was filed to it, and the counsel for the company contended that all contracts of foreign corporations were void, and that the exception to the rule was where they comply with the provisions of the law; and that the complaint was bad for not showing such compliance. The court held, that in the absence of any averment showing a violation of the law, it would not be presumed. The judge who delivered the opinion of the court admitted the general rule of law to be, that the courts would not enforce contracts prohibited by statute; and he also said that the rule was not applicable where the prohibition was for the

mere protection of one of the parties against an undue advantage which the other was supposed to possess over him.

In this case, the party seeking to enforce the contract is not the one that the legislature proposed to protect. The contract is not only declared to be unlawful, but any person violating the provisions of the act is liable to be prosecuted and punished by fine and imprisonment.

We hold that the note is not valid, and that a new trial ought to have been granted. As the case does not require it, we give no opinion as to the validity of the policy of insurance.

The judgment of the said Lake Circuit Court is reversed, with costs; and the cause is remanded to said court, with instructions to grant a new trial, and for further proceedings not inconsistent with this opinion.*

M. Wood and T. J. Wood, for appellant.

E. C. Field and J. Barnard, for appellee.

*Petition for a rehearing overruled.

SWEET v. THE CITY OF WABASH.

CITY.—Common Council.—License to Sell Intoxicating Liquors.—Penalty.—

The common council of a city, incorporated under the act of 1867, has power to pass an ordinance requiring a license to authorize the sale of intoxicating liquors in said city, and to charge for such license the sum of three hundred dollars, and to impose penalties for the violation of the ordinance.

SAME.—Evidence.—License by County Commissioners.—Internal Revenue Tax.

On a trial for the violation of such an ordinance, the defendant cannot introduce proof that he has obtained a license from the board of commissioners of the county in which the city is situated, or that he has paid the tax imposed by the internal revenue act.

SAME.—Power "to Exact License Money."—"To Regulate."—Prohibition.—Act of 1859.—Neither the power conferred on the city council "to exact license money," nor that "to regulate," confers the power to prohibit the sale. The act of 1859, to regulate and license the sale of intoxicating liquors, construed

41	7
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Sweet v. The City of Wabash.

together with the act of 1867 for the incorporation of cities, shows that the power was conferred on cities to exact a tax for revenue and for police regulation, but not the power to prohibit the sale.

SAME.—*Evidence of Amount of Tax being Prohibitory.*—What will amount to a prohibitory tax, is a question of fact. On a trial for the violation of such an ordinance, evidence is proper to show that the amount of the tax imposed is in effect prohibitory of the sale. DOWNEY, J., dissents as to this ruling, regarding the question as not being presented in this case; and holding that the question was not one to be left to the court or jury as a question of fact or as a question of law and fact.

APPEAL from the Wabash Common Pleas.

BUSKIRK, J.—The common council of the city of Wabash, which was incorporated under the act of 1867, passed an ordinance requiring all persons engaged in retailing intoxicating liquors in said city to obtain a license from said city, and to pay therefor the sum of three hundred dollars, and imposing penalties for the violation of such ordinance.

The appellant was prosecuted and convicted before the mayor of said city for a violation of said ordinance, from which judgment he appealed to the common pleas, in which court he was again convicted. The court overruled motions for a new trial and in arrest of judgment, and rendered judgment on the finding.

The appellant has assigned for error the overruling of his motions in arrest of judgment and for a new trial.

It is in the first place maintained by the appellant that the appellee possessed no power to pass the ordinance in question, and that consequently it is illegal and void.

The precise question raised was fully considered and decided by this court adversely to the appellant, in the case of *Wiley v. Owens*, 39 Ind. 429. We are satisfied with, and adhere to, the ruling in that case.

It is next assigned for error, that the court erred in refusing to allow the appellant to prove on the trial that, at the time when he was charged with violating the ordinance in question, he had obtained a license from the board of commissioners of Wabash county for the retailing of intoxicating liquors in said city, and had paid the tax imposed by the internal revenue act of Congress.

We are very clearly of the opinion that the court committed no error in excluding such evidence. The appellant was not charged with a violation of the laws of the State, or of the United States, but was charged with the violation of an ordinance of said city. If the ordinance in question was valid, then he was guilty of the offence with which he stood charged; and the fact that he had not violated the laws of the State, or of the United States, constituted no defence. On the other hand, if the ordinance was illegal and void, the appellant was entitled to an acquittal for the offence charged against him, although he had violated the laws of this State and of the United States.

The next objection is stated as follows, in the bill of exceptions: "The said defendant then offered to prove by competent evidence that the ordinance, which is incorporated in the bill of exceptions, and which is the same ordinance under which this prosecution is maintained, is unreasonable in amount, and that the same is prohibitory in its provisions, and in fact amounts to a prohibition, and was meant and intended so to be by the common council of the city of Wabash at the time of the passage of said ordinance; to which evidence the plaintiff objected, on the ground that the power of the common council of the city of Wabash was unlimited in the amount required to be paid for a license to retail intoxicating liquors, and that it was a question of law, and not of fact. The court sustained the objection, and refused to allow the said defendant to introduce such evidence, or any part thereof; to which decision of the court, in excluding said evidence, the said defendant at the time excepted."

It is maintained, with great earnestness and ability, by the counsel for the appellee, that the above objections, which were urged to the admissibility of the evidence excluded, are valid, and are supported by authority. We decided, in the case of *Wiley v. Owens*, *supra*, that the question of whether an ordinance requiring a retailer of intoxicating liquors to take out license and pay therefor the sum of five

hundred dollars was prohibitory or not, was not purely a question of law, and that we could not know judicially that any given sum was or was not prohibitory.

- In the above case, we said: "We cannot say, as matter of law, that the amount required to be paid is so large as to render the ordinance void; nor can we say, in the language of the second objection, that 'it is unreasonable.'"

We, in effect, held that it was a question of fact. We cannot see how it could be a mere question of law, which the courts are to determine from their judicial knowledge. It must, from the nature of the business, very much depend upon the facts and circumstances surrounding each particular case. An amount, which in one city would be prohibitory, in another city would not seriously embarrass the business.

It remains to inquire whether the power of the common council, in the premises, is without limit or control. If it be true, as maintained by the counsel for the appellee, that the amount which may be required for a license to retail intoxicating liquors in a city is left to the discretion, judgment, and determination of the constituted authorities of a city, then the exercise of such discretionary power is not subject to review here, but is binding and conclusive upon all persons. The question is one that must be determined by the act incorporating cities. The power of the common council of a city is such as has been conferred upon it by the legislature, and it cannot exceed the power thus conferred. The creature cannot arise superior to the creator. The legislature has licensed the traffic in intoxicating liquors. It is provided by law, that certain persons, on complying with certain conditions, may obtain from the several counties, license and authority to vend by retail intoxicating liquors in such county. The general government has recognized the legality of the business by imposing a tax thereon. The legislature has not attempted to prohibit, but to regulate and restrain the business. With the policy and wisdom of such legislation we have nothing to do. These questions belong

exclusively to the legislative and executive departments of the government, so far as the Governor may approve or veto an act, and to that extent constitutes a part of the law-making power. We are not required to decide, and we do not decide, whether the legislature could, after authorizing a license to retail in any part of a county, confer upon the common council of a city the power to pass an ordinance which was prohibitory, thus rendering null and void a privilege granted by the legislature in the passage of the license act of 1859. The real question is, what power has been conferred upon the common council of a city in reference to the retail therein of intoxicating liquors?

The 54th section of the act for the incorporation of cities, approved March 14th, 1867, reads as follows:

"Sec. 54. For removal and abatement of nuisances, to carry out and enforce sanitary regulations, for the apprehension of disorderly persons, vagrants, common prostitutes and their associates, to exact license money from all persons licensed to retail intoxicating liquors by county or state authority, and to regulate all places where intoxicating liquors are sold to be used on the premises, the common council shall have jurisdiction two miles beyond the city limits."

The power conferred by the above section is of a two-fold character. The one is, "to exact license money from all persons licensed to retail intoxicating liquors by county or state authority," and the other is, "to regulate all places where intoxicating liquors are sold to be used on the premises."

Neither the power "to exact license money" or that "to regulate" confers the power to prohibit the sale of intoxicating liquors either by retail, or where the liquor is to be drank on the premises.

The money is to be exacted only from such persons as have been "licensed to retail intoxicating liquors by county or state authority," and the power "to regulate" seems to be limited to such "places" only, "where intoxicating liquors

are sold to be used on the premises." The legislature, in the passage of the act for the incorporation of cities, by referring to "persons licensed to retail intoxicating liquors by county or state authority," has, in the strongest and most undoubted manner, manifested an intention to recognize and secure the rights of all persons who had been licensed to retail intoxicating liquors under an act to regulate and license the sale of spirituous and other liquors, etc., approved March 5th, 1859, 1 G. & H. 614.

The power to pass a prohibitory ordinance is not expressly given, and when the acts of 1859 and 1867 are construed together, no such power can arise by implication.

By the act of March 5th, 1859, the legislature adopted the policy of licensing and regulating the traffic in liquors. By the act of March 14th, 1867, the power was conferred upon the common councils of cities to exact an additional sum of money from all persons licensed under the act of 1859. The act of 1859 was a revenue and police, and not a prohibitory, act, and we so held in *Wiley v. Owens, supra*. The plain and manifest purpose of the legislature was, that the power conferred upon the constituted authorities of cities should be exercised in such a manner as not to defeat the paramount rights secured by the act of 1859; in other words, that the cities might, for the purposes of revenue and as a police regulation, exact an additional sum from licensed retailers, but they have no power to exact such a sum as would be prohibitory and thereby defeat the rights secured under the general law of March 5th, 1859.

We think the court erred in excluding the offered testimony, and that for this error the judgment must be reversed.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to grant a new trial, and for further proceedings in accordance with this opinion.

DOWNEY, J.—I cannot assent to that part of the foregoing

opinion in which it is held that the common pleas erred in refusing to admit the evidence which it was proposed to introduce, the object of which was to show that the ordinance in question was unreasonable in amount, and was prohibitory in its provisions—in fact, amounted to prohibition, and was meant and intended so to be by the common council of the city at the time of its passage. The case of *Wiley v. Owens*, *supra*, does not decide that such evidence could be admitted, but as I understood it, and yet understand it, decides the opposite, if it decides anything on the question. Had I understood the case as holding such doctrine I could not have assented to it.

In the case under consideration, the ruling of the common pleas should have been affirmed, in my opinion, for the reason, in the first place, that it was not proposed to prove any fact. It was proposed to prove, in the first place, that the ordinance was "unreasonable in amount." Now if such evidence was at all admissible, it should have been confined to proof of facts from which the court or jury trying the case could have decided the question whether or not it was unreasonable in amount. This was not proposed. But it was proposed to have the witness decide the question as a matter of opinion whether the ordinance was unreasonable in amount or not. And it was proposed to prove, in the second place, that the ordinance was prohibitory in its provisions, and was so meant and intended by the city council. This was nothing else but an offer to have the witness express an opinion upon the very question which it is supposed should have been left to the court or jury to decide. If such objections to a law or an ordinance can be submitted to a court or jury to be tried as a fact, or as a question of law and fact, surely the court or jury ought to hear, and the witnesses ought to speak of the facts from which the court or jury is to decide the main question, and the witnesses should not be allowed to decide as matter of opinion that which the triers should determine from the facts proved. If it was proposed to prove any fact tending to

Sweet v. The City of Wabash.

show that the objections to the ordinance were well founded, such proposal is not shown, and, therefore, it is not shown that there was any error in refusing to admit the evidence. See *Lewis v. Lewis*, 30 Ind. 257. But I am of the opinion that there was no error committed, for the reason, secondly, that the question is not one to be left to the court or jury as a question of fact or as a question of law and fact. Saying nothing about the form in which the offer of the evidence was made, it is decided by the majority of the court that the question whether the amount required to be paid for a license to retail intoxicating liquors by a city ordinance is unreasonable and, therefore, prohibitory, is a question to be tried as a question of fact by a jury, or by the court acting as a jury. There is no indication in the opinion as to the nature of the inquiry, or how it is to be carried on. Whether any such business be profitable or not, depends upon the demand and the number of persons already engaged in it. You must inquire, we suppose, in the first place, how many inhabitants there are in the particular city, and, secondly, as all persons are not consumers, you must inquire how many, or what proportion of them, use the article which it is proposed to sell. Your inquiries cannot stop here, for of those who are consumers, some will probably use a great deal more than others, and you must find out how much each consumer will use. When you have ascertained these facts, you can determine pretty accurately the extent of the demand for the article which is to be sold. But this is only one side of the question. You must next inquire as to the number of persons who are engaged, or who propose to engage, in the business of supplying the demand. Let us suppose that the city of Wabash contains a population of five thousand, and that it has been ascertained what per cent. or proportion of the five thousand are consumers of intoxicating liquors, and how much each consumer will use; we are next to determine how many dealers can engage in supplying the wants of these consumers, pay the required license fee, and still make the business profitable. How is

this question to be determined? Who are to be the witnesses by whom the proof is to be made? As only those, as a general rule, who are engaged, or have been engaged, in any business can testify as to whether it is, or has been, profitable or not, it is probable that those who are engaged in the business, or have been engaged in it, will be the only witnesses from whom this information can be obtained. Let us suppose that five persons can engage in this business in the city of Wabash, pay the three hundred dollars each, and yet make the business profitable. In that case, the ordinance is not unreasonable in amount, and is not prohibitory. But five more wish also to engage in the business, and they demand, and each receives, a license to retail. It is evident that if the consumption remains the same, the profits must be one-half less, and that the dangerous point of unreasonableness and prohibition is nearer at hand than it was when only five were engaged in the business. Now let us suppose that ten more persons, seeing the evidence of thrift attending the business of those already engaged in it, apply for license, that they too may retail, and they allege that the sum demanded—the three hundred dollars—is an unreasonable amount, and that if the city authorities persist in demanding the same they will not be able to pay it and yet make the business profitable; in other words, that the ordinance fixing the amount will be, as to them, prohibitory. What is to be the result? Shall they go on and sell in defiance of the ordinance, and when called to an account for it be allowed to prove that the amount is unreasonable and prohibitory? But it may be supposed that some men engage in this business at much greater expense than others. Suppose that the first five have each built, purchased, or rented, and fitted up in good style, a place for such business, and have furnished it at great expense, so that to remunerate them it will require all the incomes from all the business of the city; shall all others be shut out from competition with them on account of their extravagant surroundings, and not allowed to engage in the business for fear of reaching the

point of prohibition, or breaking down the business of those who first secured licenses?

If the case of *Wiley v. Owens*, *supra*, decided anything upon the point in question, it decided directly the opposite of what is decided by the majority of the court in this case. On the questions of unreasonableness and prohibition, this is the language of the opinion: "This objection might probably be urged to any law requiring a license, however small; because any law which interferes at all with free traffic has some tendency to prohibition. We cannot say, as matter of law, that the amount required to be paid is so large as to render the ordinance void; nor can we say, in the language of the second objection, that 'it is unreasonable.' We pass the question whether in any case an ordinance can be held void as being unreasonable, where it is adopted in pursuance of express and unlimited authority. The amount that may be reasonably charged for a license to carry on any particular branch of business must be determined by the circumstances, and can be judged of by the common council of the city where the business is to be carried on, much better than by persons remote therefrom. The profits of the business would, very properly, have something to do with the amount to be charged for a license to carry it on. We are not enabled to say, from any information we have on the subject, or from anything shown by the record, that the profits of the business are so small as to render the amount required, in this instance, for a license absolutely unreasonable or objectionably prohibitory.

"It is urged, in support of the third objection, that the requirement by cities of so large a sum to be paid for licenses will materially diminish the revenue of the State derived from the same source. This may be, but if so, it does not render the action of cities thus had in pursuance of the statute void. The same power, the legislature, that provided for a state revenue for the benefit of common schools, to be derived from the business of retailing, also provided that

cities might require a license for the same business, without limit of amount to be charged. Besides this, the act conferring the power upon cities is the last expressed will of the legislature on the subject. We are not able to see any substantial ground on which it can be held that the ordinance in question is void. It follows that the judgment below was right and must be affirmed."

If the question whether a city ordinance requiring a license is prohibitory or not is a question of fact for a jury, I do not see why the same rule would not require us to hold that the question, whether a law of the state requiring such a license was valid or not, would not also be a question for the decision of a jury as a question of fact. The state occupies to some extent the same relation to the general government that a city occupies to the state. Suppose the applicant for license to retail shall allege that he cannot afford to pay the license fee required by the general government, and also that required by the state, and that the state law is prohibitory, and therefore void, must this question go to the jury? and if the jury find the complaint well founded, must they hold the state law invalid?

I think the doctrine which should govern in this case is clearly deducible from the case of *Wiley v. Owens, supra*. "The same power, the legislature, that provided for a state revenue for the benefit of common schools, to be derived from the business of retailing, also provided that cities might require a license for the same business, without limit of amount to be charged. Besides this, the act conferring the power upon cities is the last expressed will of the legislature on the subject." "The amount that may be reasonably charged for a license to carry on any particular branch of business must be determined by the circumstances, and can be judged of by the common council of the city where the business is to be carried on, much better than by persons remote therefrom." Such views are in accordance with the former deci-

Sweet v. The City of Wabash.

sions of this court relating to the powers of municipal corporations. In *Brinkmeyer v. The City of Evansville*, 29 Ind. 187, this court uses this comprehensive language, in speaking of the powers of such corporations: "A municipal corporation is, for the purposes of its creation, a government possessing to a limited extent sovereign powers, which, in their nature, are either legislative or judicial, and may be denominated governmental or public. The extent to which it may be proper to exercise such powers, as well as the mode of their exercise, by the corporation, within the limits prescribed by the law creating them, are, of necessity, entrusted to the judgment, discretion, and will of the properly constituted authorities, to whom they are delegated." The same doctrine was recognized and laid down in *Wood v. Mears*, 12 Ind. 515. "This construction is objected to, because there may be an abuse of the powers thus conferred upon the common council. The argument, although the court should not be unmindful of consequences, might well be addressed to the consideration of the legislature, who may at any time abridge the powers of municipal corporations, if they see cause to do so; but it cannot prevail with the courts against a plain and unequivocal legislative enactment." And again, "It is peculiarly proper that each city should determine for itself what its wants and necessities, in this respect, demand." Other expressions to the same effect might be given. It is said by counsel for appellant that he understands from the decisions of this court heretofore rendered, that an act of the legislature upon the subject in question prohibitory in its provisions would not be sustained, and much less, he thinks, would an ordinance of a city of like character be sustained. We think counsel is mistaken in supposing that it has ever been held by this court that dram shops, tippling houses, or places where intoxicating liquors are sold by retail and drank, may not, constitutionally, be prohibited. Nor do we remember any case in which it has been held by this court that a city ordinance prohibitory in its character was invalid.

Voss v. Johnson.

I think the common pleas, in its rulings in the case, committed no errors, and that the judgment should be affirmed.

J. D. Conner, for appellant.

L. H. Goodwin, for appellee.

VOSS v. JOHNSON.

SHERIFF'S SALE.—*Strict Compliance with Law.*—The sheriff and execution plaintiff are held to a reasonably strict compliance with the statute in the sale of real estate under execution.

SAME.—*Failure to Offer Each Piece Separately.*—Where a complaint to set aside such a sale, made to the execution plaintiff, alleged that the real estate consisted of two forty-acre lots, and the sheriff so treated it by offering one forty-acre lot separately, and then offered both lots together, the allegations were sufficient on demurrer.

SAME.—*Bid.—Evidence.—Case Explained.*—Proof that the sheriff failed to offer the second forty-acre lot, before offering the entire eighty acres, authorized the setting aside of the sale, and the fact that the entire eighty acres only brought the amount of the execution was immaterial. *Sowle v. Champion*, 16 Ind. 165, explained by a fuller statement of facts from the transcript.

APPEAL from the Hamilton Circuit Court.

DOWNEY, J.—This was a proceeding by complaint, instituted by the appellee against the appellant, to set aside a sheriff's sale of real estate. Issues were formed, there was a trial by jury, verdict for the plaintiff, motion for a new trial and in arrest of judgment overruled, and final judgment rendered for the plaintiff, by which the sheriff's sale and deed were set aside. The defendant appealed, and has assigned for error, first, the overruling of his demurrer to the complaint; second, the refusal to grant him a new trial; and, third, the overruling of his motion in arrest of judgment.

The complaint alleges that the defendant, on the 13th day of April, 1858, obtained a judgment in the Hamilton Cir-

Voss v. Johnson.

cuit Court, against the plaintiff, for two hundred and eighty-seven dollars and seventy-five cents and costs; that on the 9th day of August, 1862, the defendant caused an execution to be issued on the judgment, and placed in the hands of the sheriff, who, on the 13th day of August, 1862, levied the same on the following real estate of the plaintiff, to wit: The east half of the north-east quarter of section twenty-two, in township nineteen north, of range four east, containing eighty acres; that the real estate was advertised for sale by the sheriff on the 6th day of September, 1862; that said tract of land consisted of two forty-acre lots; that the north forty was partly cleared, and the balance of it was pasture land, at the time of said sale, worth five thousand dollars, and of the annual rental value of five hundred dollars; that the south forty had a good dwelling-house, out-houses, orchard, and barn upon it; that at the time of said sale, said south forty was of the value of eight thousand dollars, and of the annual rental value of two thousand dollars; that the amount required to satisfy the execution was three hundred and sixty-five dollars and twenty-seven cents; that in making sale of said lands, said sheriff first offered the rents and profits of the whole of said lands, for a period of not exceeding seven years, and receiving no bid therefor, he then offered the fee simple of the said north forty; receiving no bid for that, he then fraudulently and in violation of his duty, offered the fee simple of the whole of said lands for sale, without having first offered the fee simple of said south forty; and the defendant bid therefor the sum of three hundred and seventy-five dollars, which was the amount due on said execution, including expenses of said sale; and thereupon said sheriff conveyed said lands to said defendant; and the plaintiff avers that said sheriff wholly failed to offer the rents and profits of each of said tracts separately before or after offering the rents and profits of the whole of said lands as aforesaid. He also wholly failed to offer the fee simple of said south forty before offering the fee simple of the whole, although he well

knew said lands consisted of said two forty-acre lots at the time he made said levy and sale. It is further alleged that each of said forty-acre lots was susceptible of division into lots of twenty acres; and that twenty acres off either the north or south end of the tract sold would have been much more than sufficient to have satisfied the execution, and could have been reasonably and conveniently detached and sold without damage to the aggregate value of said lands. Prayer that the sale be set aside, etc.

The statute provides, that the estate or interest of the judgment debtor in any real estate shall not be sold on execution, until the rents and profits thereof for a term not exceeding seven years shall have been first offered for sale at public auction; but if the same shall not sell for a sum sufficient to satisfy the execution, then the estate or interest of the judgment debtor shall be sold by virtue of the execution. 2 G. & H. 246, sec. 463. The statute also provides, that if the estate shall consist of several lots, tracts, and parcels, each shall be offered separately; and no more of any real estate shall be offered for sale than shall be necessary to satisfy the execution, unless the same is not susceptible of division. 2 G. & H. 249, sec. 466. We are of opinion that policy requires that sheriffs and execution plaintiffs shall be held to a reasonably strict compliance with these statutes. In the complaint in this case, it is alleged that the real estate in question "consisted of two forty-acre lots," and it was treated by the sheriff, in the presence of the execution plaintiff, at the time of the sale, as consisting of two lots or tracts. He offered for sale the north forty acres separately. If it was a separate lot or tract so was the south forty. With these allegations in the complaint, admitted by the demurrer to be true, we must hold, so far as the sufficiency of the complaint is concerned, that the land consisted of separate lots or tracts, and that it should have been offered as such by the sheriff. The next question is, did the sheriff offer and sell the land as the law requires that he should have done? It is shown that he did not offer the rents and

Voss v. Johnson.

profits of each tract separately, but only offered the rents and profits of the whole eighty acres. It also appears that he did not offer the fee simple of the south forty separately, but that after offering the fee simple of the north forty only, he sold the fee simple of the whole eighty acres. We purposely refrain from the expression of any opinion in this case upon the question whether the sheriff was bound to offer the rents and profits of each tract separately, for the reason that the decision of that question is not necessary to the determination of the case. We are of the opinion that the failure of the sheriff to offer the fee simple of the south forty before selling the fee simple of the whole eighty renders the sale invalid. It is argued by counsel for appellant that as the whole eighty acres was sold for only enough to pay the debt, and no one bid anything for the north forty, this proves that the two lots sold separately would have brought no more than they sold for together. We think this argument is not conclusive, to say nothing more of it. It rests upon the assumption that bidders, present at a sheriff's sale, which is irregular or contrary to law, will bid as much as they will at a sale which is regular and legal. It must be presumed that persons present at such a sale know the law, and what it requires of the sheriff in making such a sale, and that, seeing that the sheriff is making the sale in violation of the law, they would not bid upon the land what they would bid if the sale were regular and in conformity to law. The argument based on the price bid or paid for the land can prove nothing, in such a case as this, as to the regularity of the sale.

At all events, we think, in this case, the sheriff so far departed from the requirements of the law that the sale ought not to stand. If we were in doubt about this, the gross inadequacy of the price would dispel our doubts. According to the complaint, the north forty was worth five thousand dollars, and the south forty eight thousand dollars, making thirteen thousand dollars as the value of the eighty acres. It all sold for three hundred and seventy-five dollars. As

to the duty of the sheriff to sell real estate in parcels, see *Catlett v. Gilbert*, 23 Ind. 614, and the cases there cited; also *Tyler v. Wilkerson*, 27 Ind. 450, and *Wright v. Yetts*, 30 Ind. 185.

We are referred to the case of *Sowle v. Champion*, 16 Ind. 165, as an authority in favor of the appellant. The question in that case is a little obscured by the language used in stating the facts. A recurrence to the files, and an examination of the transcript, have satisfied us that the decision in that case has been, and is, misapprehended. There were, in that case, one hundred and sixty acres of land sold, but it was not, as would seem from certain parts of the opinion, in the same quarter section, according to the congressional survey. Eighty acres were in section ten, and the same quantity in section eleven. On page 165, it is shown that the land consisted of the east half of the south-east quarter of section ten, and the west half of the south-west quarter of section eleven. On page 166, the opinion says, "the sheriff having offered the rents and profits, etc., as prescribed by law, offered: 1. The fee simple of the north-east quarter of the premises," that is, the north-west quarter of the south-west quarter of section eleven. "2. The south-east quarter," that is, the south-west quarter of the south-west quarter of section eleven. "3. The east half of the quarter section," that is, the east half of the south-east quarter of section ten.

From the language of the opinion, on page 167, it is clear that this was the meaning of the learned judge who wrote the opinion, for he says: "As has been seen, one forty-acre tract was first offered, then another subdivision of forty acres, and the remaining eighty, being the east half, as described in the execution, was then offered," that is, the east half of the south-east quarter of section ten. "This, it seems to us, was at least a substantial compliance with the statute. Having offered two forty-acre lots, and then an eighty, without receiving a bid, it was fair to presume that

Nichols v. Glover.

a further offer of less than the entire quarter section would be useless."

By the use of the words "the entire quarter section," it might be inferred that the tracts were in the same quarter section, which, however, as we have seen, was not the case. In that case, there was no part of the land which was ultimately sold together, that had not been previously offered in smaller tracts: half of it in forty-acre tracts, and the other half in one tract of eighty acres. In that respect, that case was unlike the one under consideration, and is not an authority to sustain the action of the sheriff in this case.

We have examined the evidence, and also the instructions, and do not see anything in them requiring us to disturb the judgment rendered in the court below. It is true that the value of the land, as it appears in the evidence, is much less than is alleged in the complaint, but this does not make any change in our opinion with reference to the main question.

The motion in arrest of judgment was in writing, and is not set out in the transcript, and hence we cannot tell the ground of it. If it was upon the alleged insufficiency of the complaint, we have already decided it.

The judgment is affirmed, with costs.

J. Buchanan, for appellant.

D. Moss and F. M. Trissal, for appellee.

41	24
124	550

41	24
144	438
145	340

41	24
154	598

NICHOLS v. GLOVER.

PRACTICE.—*Agreed Statement of Facts in Part, and Finding of Jury in Part.*

Conclusiveness of Finding.—Where there is an agreed statement of facts as to part of the matters in controversy, and the disputed matters of fact are by agreement submitted to a jury to find specially, and the evidence is not in the record, but only the agreed statement and the finding of the jury upon the disputed facts, the finding will be, upon appeal, as conclusive upon the parties as though the facts found were agreed upon.

Nichols v. Glover.

VENDOR'S LIEN.—*Novation.—Transfer of Debt and Lien.*—A. sold and conveyed certain land to B., who thereby became indebted for purchase-money, one thousand two hundred and sixty-seven dollars; A. was indebted to C. one thousand two hundred and seventy-five dollars for certain other lands by C. sold to A., which indebtedness was secured by notes and mortgage on the lands; all the parties met and a complete novation took place. A. transferred to C. the amount that B. owed A.; B., instead of giving his notes to A., gave them to C., who surrendered his claim on A. B. failed to pay his notes to C., who brought suit and obtained a decree enforcing his vendor's lien, and purchased under such decree the land so conveyed by A. to B.

Held, in a suit for possession by C. against D., who claimed title through one E., who had taken a mortgage with full notice of all the rights and equities of C., that the assignment of the debt itself, without the assignment of the evidence of the debt, carried with it the vendor's lien on the land; and C. was entitled to recover; that it is the unpaid purchase-money which creates the vendor's lien, and it is immaterial to whom the acknowledgment of the debt is made, if it be so made by direction of the vendor.

APPEAL from the Owen Circuit Court.

PETTIT, C. J.—This was a suit by the appellant against the appellee for the possession of real estate and damages for its detention. The complaint was in the proper form. Answer of general denial, and the following agreed statement of facts was used in evidence, together with certain questions put to and answered by the jury:

"It is agreed by and between the parties to this action that the following are facts, and are, for the purpose of this case, to be regarded and treated as true, namely: First, that James Smith was the owner of the land in controversy, and sold and conveyed it to John Beaman, who sold and conveyed it to William D. Alexander, for and in consideration of the sum of seventeen hundred and sixty-seven dollars and ten cents, of which sum he paid five hundred dollars in hand, leaving due and unpaid the sum of twelve hundred and sixty-seven dollars and ten cents; that prior to such sale by Beaman to Alexander, the plaintiff and his brother, William H. Nichols, had sold to the said Beaman another tract of land, for which the said Beaman was indebted to the said Samuel T. Nichols and William H. Nichols in the sum of about twelve hundred and seventy-five dollars, which

Nichols *v.* Glover.

was secured by the notes of said Beaman and a mortgage on such land; that at the time when said Beaman made the deed to the said Alexander for the land in controversy, the said Beaman, Alexander, Samuel T. Nichols, and William H. Nichols met together, when it was agreed by and between the said persons that the said Samuel T. and William H. Nichols should surrender to the said Beaman his notes and mortgage, which was to operate as an extinguishment and payment of his indebtedness to them; that the said Alexander should pay to the said Samuel T. and William H. Nichols the amount which he owed to the said Beaman for the unpaid purchase-money of the land in controversy, and should execute his notes therefor, which was to operate as a payment and extinguishment of the indebtedness of the said Alexander to the said Beaman for said land; that in pursuance of the said agreement, the said Samuel T. and William H. Nichols then surrendered up to the said Beaman his notes, and entered satisfaction of said mortgage, and the said Alexander then executed and delivered to the said Samuel T. and William H. Nichols his two promissory notes, each for six hundred and thirty-three dollars and fifty-five cents, due in one and two years after date, and the said Alexander gave no mortgage or personal security to secure the payment of said notes, which said notes were dated the 30th day of December, 1857.

“Second. That Samuel T. and William H. Nichols, on the 5th day of April, 1859, obtained in the Owen Common Pleas Court a judgment and decree rendered on the note due on the 30th of December, 1858, given by the said Alexander to the said Nichols for the unpaid purchase-money of the land in controversy, which said judgment and decree is in the words and figures as follows: ‘Samuel T. Nichols *et al.* *v.* William D. Alexander. Civil action.

“‘And now come said plaintiffs, by Franklin and Richards, their attorneys, and by affidavit filed make proof of publication for three consecutive weeks of the proper notice to said defendants in the Owen County Journal, a public weekly

newspaper of general circulation, printed and published in Owen county, and it appearing that the same has not been sixty days before the first day of the present term, this cause is continued by operation of law.

“ ‘Samuel T. Nichols and William H. Nichols v. William D. Alexander. Civil action.

“ ‘And now come said plaintiffs, by Franklin and Richards, their attorneys, and proof of publication having been made at the last term of this court of the pendency of this action, as required by the statute, the said defendant, on motion, is three times called, but comes not, and herein wholly makes default, and this cause is now submitted to the court for trial, on complaint, default, and proof; and the evidence being heard, the court finds that said plaintiffs ought to recover of said defendant the sum of six hundred and forty-six dollars (\$646), the amount found due on the promissory note filed with said complaint. And the court further finds that said note was given by said defendant for and in part consideration of the land described in said complaint, to wit: Commencing nine poles and six links east of the north-west corner of fractional section two (2), township ten (10), range three (3) west, and running thence east on township line one hundred and thirty-two poles to a stake, thence south sixty-three poles to White river, thence with the meanderings of said river to the south-east corner of a tract of land heretofore set off by commissioners to John Smith, in accordance with the will of Samuel Smith, thence north to the place of beginning; and the court finds that said sum being for the purchase-money ought to be a lien on said premises.

“ ‘It is, therefore, considered by the court that said plaintiffs recover of said defendant said sum of six hundred and forty-six dollars (\$646), the damages aforesaid, together with the costs of this suit, all to be collected without relief from valuation or appraisement laws; and it is further considered and ordered that said judgment be, and the same is hereby declared to be, a lien on the premises hereinbefore described, and that said premises, or so much thereof as is necessary,

Nichols v. Glover.

be sold by the sheriff, as other property is sold on execution, to satisfy the said judgment and costs of suit, as well as accruing costs and interest due at the time of such sale.'

"Third. That an execution and order of sale was issued by the clerk of said court, directed to the sheriff of said county, who, by virtue thereof, levied on and advertised the land in controversy for sale, and on the 12th day of November, 1865, in due form of law, sold the said land, under and by virtue of said execution and order of sale, to the plaintiff, Samuel T. Nichols, and on the said day, in due form of law, made and delivered to him a deed for said land.

"Fourth. That the said William D. Alexander, on the 19th day of April, 1858, mortgaged the lands in controversy to Hezekiah Wampler, which mortgage was recorded.

"Fifth. That said Wampler, on the — of May, 1859, by the decree of the Owen Circuit Court, obtained a decree of foreclosure of the said mortgage, and an order for the sale of the land in controversy.

"Sixth. That on the — of —, 185—, a copy of the said decree was issued by the clerk of the said court, directed to the sheriff of said county, who, by virtue thereof, advertised the land in controversy for sale, and on the — of —, 1859, said sheriff, in due form of law, sold the land in controversy to said Wampler, and made to him a deed therefor.

"Seventh. That the said Wampler, on the — day of —, 1864, sold and conveyed the lands in controversy to the defendant, who entered into the possession of said land, and has continued in the possession thereof to the present time. It is further agreed by the said parties that the disputed facts in this case shall be submitted to a jury, who are to find the facts specially upon the said disputed facts. August 11th, 1869."

By the agreement of the parties a jury was empanelled, evidence heard, and the following questions were put to and answered by the jury:

1. Did H. Wampler, deceased, have notice that the notes given by Wm. D. Alexander and brother were given in part

payment for the land in controversy at the time the mortgage from Alexander to Wampler was executed? Answer. Yes.

2. If yes, at what time was such notice given? Answer. About the middle of March, 1858.

3. What is the rental value of the lands since they came into the possession of defendant Glover? Answer. Nine hundred and twelve dollars and fifty cents.

Upon the agreed state of facts and these findings or answers to the questions, the cause was by the parties submitted to the court for trial, and the court found for the defendant.

The plaintiff moved for a new trial for the following causes: First, that the finding of the court is contrary to law; second, that the finding of the court is not sustained by sufficient evidence. The motion was overruled, and exception properly taken, and final judgment was rendered against the appellant.

The only error alleged is the overruling of the motion for a new trial. Was this ruling erroneous?

We proceed to epitomize and state in chronological order the evidence as shown by the agreed state of facts and by the findings of the jury.

1. Samuel T. and William H. Nichols were the joint owners of a tract of land in Owen county, which they sold and conveyed to John Beaman; that Beaman was indebted to them for the unpaid purchase-money of the said land in the sum of about twelve hundred and seventy-five dollars, which was evidenced by notes and secured by a mortgage on the said premises.

2. The said John Beaman was the owner of the premises in controversy, and on the 30th day of December, 1857, he sold the same to William D. Alexander, for the sum of seventeen hundred and sixty-seven dollars and ten cents, of which he paid in cash five hundred dollars, leaving due twelve hundred and sixty-seven dollars and ten cents; that prior to the execution of the deed, Samuel T. and William H. Nichols,

William D. Alexander, and John Beaman met together, when it was agreed by and between the said parties, that Alexander should pay to the said Nichols the balance due from him to Beaman on the unpaid purchase-money for said premises, and this was to extinguish the indebtedness of Alexander to Beaman; that in consideration thereof the said Alexander agreed to pay the said sum to Nichols, and Nichols agreed to surrender to the said Beaman his notes and enter satisfaction of his mortgage; that in pursuance of the said agreement, the said S. T. and W. H. Nichols surrendered to the said Beaman, as satisfied, his notes, and entered satisfaction of the said mortgage, and the said Alexander then executed and delivered to the said Samuel T. and William H. Nichols his two promissory notes, each for the sum of six hundred and thirty-three dollars and fifty-five cents, payable in one and two years from date.

3. William D. Alexander, on the 19th day of April, 1858, mortgaged the lands in controversy to Hezekiah Wampler.

4. Samuel T. and Wm. H. Nichols, on the 5th day of April, 1859, obtained in the Owen Common Pleas Court a judgment on the note executed by Alexander to them, and which was due December 30th, 1858, against the said Alexander, for the sum of six hundred and forty-six dollars, and decree that the plaintiff held a vendor's lien on the premises in controversy, and that they should be sold to satisfy the said judgment.

5. The said Hezekiah Wampler, on the — day of May, 1859, obtained in the Owen Circuit Court a decree against the said Alexander, foreclosing the said mortgage and ordering the sale of the premises in controversy.

6. The sheriff of Owen county, on the — day of —, 1859, in due form of law, sold the said premises, under the said decree of foreclosure, to the said Hezekiah Wampler, and executed to him a deed therefor.

7. Hezekiah Wampler, on the — day of —, 1864, sold and conveyed the premises in controversy to the appellee, Andrew J. Glover, and placed him in possession, and he has

remained in possession thereof ever since, and is now in possession of the same, and has received the rents and profits thereof since his purchase.

8. The sheriff of Owen county, on the 12th day of November, 1865, under and by virtue of an order of sale, issued on the said judgment and decree, rendered in favor of the said Samuel T. and Wm. H. Nichols, and against the said Alexander, sold the premises in controversy to the appellant, and executed to him a deed therefor.

9. The parties being unable to agree whether the said Wampler, at the time he took the mortgage on the premises in controversy, had notice that the purchase-money for said premises was due and unpaid, and as to the rental value of said premises since the same had been in the possession of the appellee, the said questions were, by the agreement of said parties and the direction of the court, submitted to a jury, with directions to find the facts specially. The jury, in answer to questions submitted by the court, found that Wampler had notice; that William D. Alexander was indebted to the said S. T. and W. H. Nichols for the unpaid purchase-money for said premises, at and before the time when he took his mortgage on the said premises; and that the rental value of said premises, from the time when the appellee took the possession thereof up to the time of the trial, was nine hundred and twelve dollars and fifty cents.

10. This case was, upon the agreed state of facts, and the facts specially found by the jury, submitted to the court for trial and decision.

The court found for the appellee. The appellant moved the court for a new trial, and assigned as reasons therefor, that the finding of the court was contrary to law, and was not sustained by sufficient evidence. The court overruled the motion, and rendered a final judgment for the appellee. The appellant excepted, and appeals to this court.

There is no controversy as to any question of fact. The material facts were either agreed upon or found by the jury. The evidence adduced before the jury, upon the disputed

Nichols v. Glover.

questions of fact, is not in the record. The finding of the jury is as conclusive upon the appellee as though the facts found were agreed upon. The case, then, stands thus: John Beaman was the absolute owner in fee simple of the lands in dispute; he sold and conveyed to Alexander; Alexander owed him, for the unpaid purchase-money, the sum of twelve hundred and sixty-seven dollars and ten cents. Beaman was indebted to Samuel T. and Wm. H. Nichols in the sum of twelve hundred and seventy-five dollars, for lands by them sold to him, and which was secured by notes and mortgage on such lands. All the parties met together, when a complete novation took place. Beaman, for the purpose of paying his own debt, transferred to Nichols the amount that Alexander owed him; Alexander, instead of giving his notes to Beaman, gave them to Nichols. The Nicholises surrendered their claim on Beaman; Alexander did not pay his notes to Nichols; they brought suit, obtained a judgment and decree enforcing a vendor's lien, took out execution and order of sale, under and by virtue of which the lands in dispute were sold and purchased by the appellant, who obtained a deed, under which he claims to be the owner and entitled to the lands in dispute. The appellee claims title through Wampler, who took a mortgage with full notice of all the rights and equities of the appellant.

It is conceded that Beaman had a lien upon the lands in dispute for his unpaid purchase-money, and that if Alexander had executed his notes to Beaman and had assigned them to Nichols, Beaman's vendor's lien would have been transferred to them; but it is claimed that, because the debt itself, and not the evidence of the indebtedness, was assigned and transferred, this did not carry with it the vendor's lien. This is the principal question in the case. If the arrangement between the parties transferred to the Nicholises the vendor's lien which Beaman had on the land, and Wampler took his mortgage with notice thereof, then the appellant has a prior lien, equity, and title, and is entitled to recover possession of the lands and damages for their use and occu-

pation. If, however, the vendor's lien was waived or abandoned, then the appellee has the prior and paramount title, unless the proceeding in the Owen Common Pleas Court, in the action of Samuel T. and William H. Nichols against W. D. Alexander, in which the court decrees a vendor's lien, is a proceeding *in rem*; for if it is, it is binding and conclusive upon Wampler and all who claim under him.

The law in this State is too well settled to justify citing authorities, that a vendor of real estate has a lien for unpaid purchase-money, whether he takes a note or not, and that his lien is transferable or assignable, by a written instrument when no note is given, or assignable when a note is given; and that this lien may be waived expressly, or by taking collateral security of the vendee, or the personal obligation of a third person as security for the payment of the purchase-money.

The question in this case resolves itself into this: If A. owes B., and A. conveys land to C. and has a lien for the purchase-money on the land so conveyed, and they all meet together and agree that C. shall execute his note to B. for the unpaid purchase-money, instead of giving the note to A., which is done, and B. releases A. from his debt, has B. a lien on the land conveyed by A. to C. for the purchase-money? We hold that he has. It is clear that if C. had given his note to A. for the unpaid purchase-money, A. might have assigned it to B., and thus transferred his vendor's lien to B. Or, if no note had been given by C. to A. for the purchase-money, yet A. might have, by a written instrument, assigned his vendor's lien to B.

The fact that, by the agreement of all parties, the note was made by the vendee to a third person to pay the vendor's debt to him, and not to the vendor and by him assigned to the third person, cannot release the vendee from the lien. The counsel on both sides have written long, learned, and able briefs, but we do not deem it necessary to animadvert on them or the citations. The appellee contends.

Nichols v. Glover.

that, because the note for the purchase-money was not given directly to the vendor, though at his instance it was given to another, no vendor's lien attaches. While on the other side, it is contended that it is the unpaid purchase-money which creates the lien, and is the debt, and that it is no matter to whom the acknowledgment of that lien is given by the vendee, if it is at the request and consent of the vendor, or by the agreement of the vendor and vendee. Out of numerous authorities that the latter view is correct, we cite but three. In *Kern v. Hazlerigg*, 11 Ind. 443, the court say and hold: "The debt is regarded as the principal, and the lien a mere incident; and the transfer of the debt carries with it the incident, in the same manner as the transfer of a debt secured by mortgage carries with it the mortgage security." *Honore's Ex'r v. Bakewell*, 6 B. Mon. 67, and *Wiseman v. Hutchinson*, 20 Ind. 40, are directly in point.

The evidence being all written, we can judge of it as well as the court below, and we hold that on it the court erred in its finding and judgment, and there being no reason or necessity for a new trial, and having by law the power and right to order the court below to enter the proper judgment, we reverse the judgment, and direct the court below to render a finding and judgment for appellant (plaintiff below) for the possession of the lands, and for nine hundred and twelve dollars and fifty cents, the amount found as the rental value of the lands since the defendant (appellee) has been in possession of them, and at the costs of the appellee.

BUSKIRK, J., having been of counsel, was absent.

S. H. Buskirk, J. C. Robinson, W. E. Dittemore, and S. Curtis, for appellant.

C. F. McNutt, W. A. Montgomery, and G. W. Grubbs, for appellee.

SHERLOCK ET AL. v. BAINBRIDGE.

NAVIGABLE RIVER.—Riparian Proprietor.—Wharf-Boat.—Steamboat.—The Ohio river being a "common highway," the owner of the soil along its banks, although his title may extend to low-water mark, cannot so construct his wharf as to materially interfere with the navigation of the river. His title to the soil of the shore, or under the water, does not authorize him to obstruct, in any way, the free use of the river by the public as a highway.

Every citizen has the right to use it as such, in all its parts not occupied for the time being by others in its navigation. This right to navigate includes the right to stop when the purposes of such navigation require it, for a reasonable length of time, to ship and discharge freight and passengers.

The navigation of public rivers is governed by the same principle that is applied to other common highways. Thus, if one in navigating the river and in landing at a wharf with his steamboat should lap over an adjoining wharf-boat, without touching the wharf-boat, it would not be a trespass, and he would not be liable for damages occasioned by his boat's preventing other boats from landing at the wharf-boat, or even if his boat injured the wharf-boat, if there was no want of skill or care on his part.

Any one navigating the river has the right to land at such wharf as suits his convenience, and if in doing so the current of the river, or other circumstance, carries the stern of his boat down stream so that a portion of his boat's length lies in front of an adjoining wharf, but still in the navigable water of the river, he is but in the exercise of a legal right, and cannot be responsible for any consequential damages which may be sustained by other boats' being thereby prevented from landing at the wharf he may overlap; provided, that in thus exercising his right, he use due skill, care, and dispatch, and subject others to as little inconvenience as is possible, consistently with the exercise of his own rights. *Bainbridge v. Sherlock*, 29 Ind. 364, modified.

DOWNNEY, J., dissents, on the ground that the opinion unnecessarily and improperly subordinates the rights of the riparian proprietor to the mere convenience of the navigator.

APPEAL from the Jefferson Circuit Court.

WORDEN, J.—This was an action by the appellee against the appellants.

The complaint contained four paragraphs, but a demurrer was sustained to the third, and it need not be noticed. The other paragraphs are as follows:

"First. The said plaintiff complains of said defendants, and says that on the 1st day of June, 1857, and on divers other days and times, between that day and the day of the commencement of this suit, the said defendants, without

Sherlock et al. v. Bainbridge.

leave, wrongfully entered upon a certain piece or tract of land lying and being in the city of Madison, county of Jefferson, and State of Indiana, described as follows: River block No. 5, south of Ohio street, in the city of Madison, county of Jefferson, and State of Indiana, running to low-water mark on the Ohio river, of which the plaintiff, at the date aforesaid, and at all times since, continually was, and still is, the owner; and the defendants, on the day and during the time aforesaid, continually took possession of, used, occupied, broke, and destroyed the wharf-boats of the plaintiff, then and there, during the time aforesaid, on, attached to, connected with, tied to, and belonging to, said property, by which the plaintiff was damaged to the amount of ten thousand dollars.

“Second. For second paragraph of complaint, plaintiff says that on said 1st of June, 1857, and at all times continuously from said date until the commencement of this suit, he was the owner and possessor of certain wharf-boats afloat upon the Ohio river, attached and anchored to the said real estate mentioned in the first paragraph, then and there belonging to said plaintiff, and that said defendants, during all said time at and between the periods aforesaid, were the owners of certain steamboats then navigating the Ohio river, daily passing and repassing said wharf-boats belonging to the plaintiff as aforesaid; and plaintiff avers, that on said 1st of June, 1857, and on divers other days and times between said date and the day of commencing this suit, the said defendants did run, steer, and navigate their said steamboats in, upon, and against the plaintiff's wharf-boats aforesaid, so as to break, damage, spoil, and injure said wharf-boats, and did run and steer their said steamboats unnecessarily so near to and against said wharf-boats as to throw said wharf-boats out of the water and upon the shore to which they were attached, thereby doing great damage to said wharf-boats, to the injury of the plaintiff ten thousand dollars.

“Fourth. And for fourth paragraph, plaintiff says that he is now, and has been for more than ten years last past, the

owner and occupier of the said land mentioned in the first paragraph of this complaint, which said land is bounded on the south by low-water mark on the Ohio river, and that he and those under whom he claims have for a long time, to wit, for the period of twenty years, enjoyed, as appurtenant to said land, the right and privilege of erecting and maintaining a wharf and wharf-boats on said land; and plaintiff says that on said 1st of June, 1857, and during all the time between that date and the day of the commencement of this suit, the said defendants were the owners and possessors of said steamboats in the second and third paragraphs of this complaint mentioned, and with them, by their agents and employees, navigated the Ohio river, as in said paragraphs stated, making the landings as therein stated, and that they did, with their said boats, as therein stated, unnecessarily strike against, injure and molest, lay up against the said wharf-boats of the plaintiff, and obstruct passage to and from the wharf and wharf-boats of said plaintiff, as stated in said paragraphs, to the great injury of the plaintiff; and he further states that said defendants, when making landings at the city of Madison aforesaid, landed twice every day and oftener at a wharf owned by one ——— Stout, and unnecessarily and without any cause, in making said landings twice every day and oftener, lapped over and upon the wharf-boat of the plaintiff, and for a long time at each landing did occupy the river in front of the plaintiff's wharf, and so, during the time of their landing, and when so landed, interrupt and prevent ingress to, and egress from, his said wharf-boat, to the great injury and damage of the plaintiff; and he says that said defendants, in making their landings at the times before mentioned, did strike against, break, and injure the said wharf-boat of said plaintiff and push and throw the said wharf-boat upon the dry land; and plaintiff says that by reason of defendants' so throwing and pushing his said wharf-boat upon the dry land as aforesaid, he has been compelled to pay, and did pay, large sums of money to restore the same to the water and to repair it, and he says that said

Sherlock et al. v. Bainbridge.

wrongs and trespasses of said defendants on the property of the plaintiff, so done and committed as aforesaid, were done purposely to injure his aforesaid property, and without any necessity whatever; and said defendants refuse to discontinue said wrongs and trespasses, but threaten to continue the same; wherefore the plaintiff prays judgment for the sum of ten thousand dollars, and furthermore prays that the defendants may be enjoined from injuring the plaintiff's property as aforesaid, by their repeated daily trespasses as aforesaid, and that they be required so to use their property and enjoy all their rights and privileges as not to trespass in manner aforesaid, upon the property of the plaintiff, and for all proper relief."

To this complaint a general denial was filed, as well as other pleadings not necessary to be noticed in this opinion; and the cause was tried by a jury, who returned a verdict for the plaintiff for the sum of five thousand dollars, on which judgment was rendered; a motion for a new trial, made by the defendants, having been overruled, and exception taken.

It may be gathered from the evidence, that next above the plaintiff's wharf, that is, up the river, there is a street called West street, sixty feet in width; and next above West street is another wharf, called Roe's Wharf, one hundred and sixty-eight feet in width, up and down the river; then comes a narrow alley, and then another wharf, called the City Wharf, one hundred and sixty-eight feet in width; so that the plaintiff's wharf is below the other two. There was evidence tending to show that, for years before the commencement of the suit, the defendants were in the habit of landing their steamboats frequently, and sometimes making several landings daily, at Roe's wharf, and sometimes lying there several hours; that when thus landed, the sterns of the boats thus landed would lap down below the upper portion of the plaintiff's wharf, and sometimes strike against the plaintiff's wharf-boat, doing it injury, and sometimes driving the wharf-boat and the float ashore, causing

expense in repairing and replacing the same; that when the defendants' boats were thus landed, with their sterns lapping down below the upper portions of the plaintiff's wharf, as above stated, other boats, in attempting to land at the plaintiff's wharf, by crowding between the steamboats and the plaintiff's wharf-boat, would sometimes push the latter ashore, causing damage and injury; that by reason of the landing of the defendants' boats at Roe's wharf, with their sterns extending down, as above stated, other boats navigating the river, which would otherwise have landed at the plaintiff's wharf, could not conveniently make that landing, and landed at the city wharf, whereby the value, business, and profits of the plaintiff's wharf were greatly diminished.

The above is not a full statement of the evidence, but it is a sufficient summary thereof to develop the questions on which the case must be decided, and to show the application of the charge of the court, which will now be noticed.

The court, of its own motion, charged, amongst other things, as follows:

"If you find from the evidence that the defendants, in landing their boats at another wharf-boat, lapped over and upon, to any extent, the plaintiff's wharf-boat, but doing no damage to the wharf-boat, stage planks, and other appendages, or float, to said wharf-boat, or that in landing at said other wharf lapped over to any extent the plaintiff's wharf-boat without touching it, these acts, if done without the plaintiff's consent, are trespasses; for the plaintiff has a right to have free access for steamboats to and from his wharf-boat that may wish to patronize it, and to the free use of all the adjacent waters near to, and in front of, his wharf-boat, irrespective of any skill with which the defendants' boats may be managed; and these acts, if done within six years immediately before the commencement of this suit, you should find for the plaintiff; but you can only assess nominal damages for these acts, unless they prevented other steamboats in getting to and from plaintiff's wharf-boat to take on and discharge freight or passengers, or that other.

boats have, by reason of these acts, landed to take on or discharge freight or passengers at some other wharf-boat instead of the plaintiff's; and if such is the case, then you should find for the plaintiff for such amount of damages as he has actually sustained by such acts, unless the evidence shows that the defendants' acts in lapping over without touching plaintiff's wharf-boat were done with malice, insult, or deliberate oppression, and if you find that is the case, you may, in addition to the actual damages sustained, give such exemplary damages as shall tend to prevent a repetition of the injury."

The charge was excepted to by the defendants below, and was made the foundation, in part, of the motion for a new trial. Error is assigned upon the ruling below in overruling the motion for a new trial.

The appellee claims that the appellants cannot be heard to say that the charge was erroneous, because it was embodied in charges asked by them to be given. We have examined the charges asked by the appellants, and find that none of them embodies such statement of the law as is contained in the charge above set out.

The questions arising in the case have been elaborately and very ably discussed by the respective counsel in the cause, both orally and in printed briefs, by which our labors have been materially lightened, and much time saved.

It is contended by counsel for the appellants, that the title of the owner of land bordering upon our navigable rivers extends only to high-water mark, while it is claimed, on the other side, that such title extends to low-water mark. This question, we think, does not arise in the case, and need not be decided, inasmuch as it was admitted on the trial that the plaintiff was the owner of the land, as stated in his complaint, and inasmuch as the result must be the same, whether the title of the appellee be deemed to extend only to high-water mark or beyond it. The question, however, is an important and interesting one, and as counsel on both sides have cited many authorities upon the point, we here refer

Sherlock *et al.* v. Bainbridge.

to some of the more important ones. *The People v. The Canal Appraisers*, 33 N. Y. 461; *McManus v. Carmichael*, 3 Iowa, 1; *The Steamboat Magnolia v. Marshall*, 39 Miss. 109; *Stevens v. The Patterson and Newark Railroad Co.*, 34 N. J. 532; *Railroad Company v. Schurmeir*, 7 Wal. 272; *Lessee of Blanchard v. Porter*, 11 Ohio, 138; *Booth v. Shepherd*, 8 Ohio St. 243; *Ensminger v. The People, etc.*, 47 Ill. 384.

The following cases in Indiana support the doctrine that the title of the riparian proprietor upon the Ohio river extends to low-water mark. *Stinson v. Butler*, 4 Blackf. 285; *Cowden v. Kerr*, 6 Blackf. 280; *Doe v. Hildreth*, 2 Ind. 274; *Gentile v. The State*, 29 Ind. 409; *Bainbridge v. Sherlock*, 29 Ind. 364, which was this case when before in this court; and *Martin v. The City of Evansville*, 32 Ind. 85.

This seems also to be the doctrine maintained in Ohio and Illinois, and also in Mississippi, as to the Mississippi river.

We may remark, in conclusion upon this point, that whatever might be our views upon this question, were it an original and open one, we think it should perhaps be regarded as settled by the decisions in this State, extending as far back as 1837, and continuing in an unbroken series down to the present time. These decisions have become a rule of property. Purchases have been from time to time made with a view to them; and were the question necessarily involved in the case, we should hesitate long before overturning them and establishing a new rule. But, as before stated, the question is not involved in the case. We proceed to the questions in the case.

It is hardly necessary to say that the Ohio is a navigable river. It was provided in the 4th article of the ordinance of 1787, for the government of the territory of the United States northwest of the river Ohio, that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those

Sherlock *et al.* v. Bainbridge.

of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor."

The river being thus made a "common highway," it follows that if the appellee's title does technically extend to low-water mark, or even to the thread of the stream, he cannot so construct his wharf as to materially interfere with the navigation of the river. His title to the soil of the shore, or under the water, does not authorize him to obstruct in any way the free use of the river by the public as a common highway. He may build a wharf for the accommodation of the public navigating the river, and for his own private profit, not interfering with the navigation. But all this he may do, though his title extend only to the stream, or to high-water mark. Wharves are necessary for the convenience of transportation and commerce upon navigable rivers, and, if constructed so as not to interfere with navigation, aid and facilitate it. It is very well settled by authority that the owner of land bordering on a navigable stream, though his title extend no further than to the stream, not embracing the shore or land between high and low-water mark, may build such wharf.

Thus, in the case of *Bowman's Devises v. Wathen*, 2 McLean, 376, the court say: "We apprehend that the common law doctrine, as to the navigableness of streams, can have no application in this country; and that the fact of navigableness does, in no respect, depend upon the ebb and flow of the tide. Where a stream, which is clearly not navigable, forms the boundaries of proprietors on each side of it, under the common law, each may claim to the middle of the stream. But this right cannot be exercised to the injury of other rights of the same nature. On navigable streams the riparian right, we suppose, cannot extend, generally, beyond high-water mark. For certain purposes, such as the erection of wharves, and other structures, for the convenience of commerce, and which do not obstruct the navigation of the river, it may be exercised beyond this limit."

In the case of *Yates v. Milwaukee*, 10 Wal. 497, the court

use the following language: "But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be. This proposition has been decided by this court in the cases of *Dutton v. Strong*, 1 Black, 23, and *The Railroad Co. v. Schurmeir*, 7 Wal. 272."

See, also, to the same effect, the case of *Grant v. The City of Davenport*, 18 Iowa, 179; also the case of *East Haven v. Hemingway*, 7 Conn. 186.

These cases (and there are, doubtless, others to the same effect) establish the proposition that the appellee has a legal right to his wharf, and is entitled to be protected in the enjoyment thereof, whether he be deemed to have a title to the soil of the shore or otherwise.

But the right thus to construct and use a wharf is subject to the paramount right of the public to navigate and use the river as a common highway, and can in no way interfere with such use of the river by the public. This principle runs through all the cases involving the question. *Dutton v. Strong*, 1 Black, 23; *Yates v. Milwaukee*, *supra*; *Grant v. The City of Davenport*, *supra*; *Rice v. Ruddiman*, 10 Mich. 125.

The river being thus a common highway, free to all citizens, it follows that every citizen has the right to use it as such, in all of its parts not occupied, for the time being, by others in its navigation. The right to use the stream as a highway is not confined to any particular part or portion thereof, but extends to the entire stream, just as the right to use a common highway extends to all parts thereof. *Williams v. Wilcox*, 8 A. & E. 314; *Morrison v. Thurman*, 17 B. Mon. 249; Angell Highways, sec. 226.

Sherlock *et al.* v. Bainbridge.

The right to navigate the river as a public highway includes, necessarily, the right to stop where the purposes of such navigation require it, for a reasonable length of time, to ship and discharge freight and passengers; just as a coach or cart or wagon may stop on the highway for like purposes. The navigation of public rivers is governed by the same principle that is applied to other common highways. Angell Highways, sec. 229. A craft navigating the river, perhaps, has a right to land upon the shore or bank of the riparian proprietor in case of necessity. Angell Highways, sec. 74. So, travellers on ordinary highways, in case of necessity, may go *extra viam*. Thompson Highways, 2. Wharves, though usually constructed for the benefit and profit of the owners in the charges received for their use, promote and facilitate the business of navigation; and boats may touch at any of them they may choose in the due prosecution of their business.

With these preliminary observations we are prepared to consider the charge given as above set out. The charge given embodies two propositions in substance.

First. That if the appellants' boats, in landing at another wharf, lapped over the appellee's wharf-boat, though without touching it, such acts were trespasses, if done without the consent of the appellee, and this irrespective of any question of skill with which the appellants' boats were navigated.

Second. That the appellee had the right to have free access to his wharf-boat for steamboats that wished to patronize it, and to the free use of all the adjacent waters near to and in front of his wharf-boat; and if the acts of the appellants, in landing their steamboats at another wharf, thus lapping over and upon the appellee's wharf-boat, as above stated, prevented other steamboats getting to and from the appellee's wharf-boat to take on or discharge freight or passengers, or if other boats, by reason of such acts, landed, to take on or discharge freight or passengers, at some other wharf-boat, instead of the appellee's, the appellants were liable for the damages which the appellee sustained thereby.

The charge thus given was, in our opinion, radically wrong in both particulars.

It would seem, on principle, that even if the appellants' boats had run against the appellee's wharf-boat and damaged it, the appellants would not be liable unless there was some want of skill or care in navigating the appellants' boats. The appellants, as we have seen, had a right to run their boats in all parts of the river, not for the time being occupied by other boats or craft navigating the river, and to stop at any wharf which their business might require. The appellee's wharf or wharf-boat is clearly entitled to no greater immunity, as against a person navigating the river, than if it had been a floating craft navigating the river, in which event, in case of collision, wilfulness, negligence, or want of skill would be necessary in order to hold a party responsible. Angell Highways, sec. 447. See, as having some bearing upon this question, the cases of *Morrison v. Thurman*, *supra*; *Taylor v. The Atlantic Mutual Ins. Co.*, 37 N. Y. 275; *Dalton v. Denton*, 1 C. B. N. S. 672.

But, however this may be, the charge is radically wrong in holding that the acts of the appellants, as set out, without touching the appellee's wharf-boat, would be trespasses, and in holding that the appellants would be liable to the appellee for damages occasioned by their boats' preventing other boats, by the means stated, from landing at the appellee's wharf.

We have already seen that the appellee, whatever may have been the extent of his title to the soil, had no right to so construct or use his wharf as to interfere with the paramount right of the public to the free use of the river as a common highway. The appellants had the legal right to navigate the river, and every part thereof, and to stop at such wharves as their business might require. And if in doing so, they, by a portion of the length of their boats, occupied the water in front of the appellee's wharf, they were but exercising a legal right, and could not, in so doing, be trespassing. The appellee was not, in our opinion, entitled "to the free use of all the adjacent waters near to and in

front of his wharf-boat," as against parties temporarily occupying the same in due course of the navigation of the river. Such a right in the appellee would be utterly inconsistent with the right of the public to the use of the river as a common highway.

The appellants had the right to land at such wharf or wharves as suited their convenience; and if in doing so the current of the river or other circumstance carried the stern of their boat down stream so that a portion of the boat's length lay in front of the appellee's wharf, but still in the navigable waters of the river, they were but in the exercise of a legal right, and cannot be responsible to the appellee for any consequential damages which he may have sustained by other boats' being thereby prevented from landing at his wharf, provided that the appellants, in thus exercising their right, exercised due care, skill, and dispatch, and subjected the appellee to as little inconvenience as was possible, consistently with the exercise of their own rights. Doubtless unreasonable and vexatious delays, thus wrongfully preventing ingress to and egress from the appellee's wharf, would subject the appellants to liability for the damages consequent thereon, but this was not the theory at all on which the case was put to the jury.

We have arrived at conclusions somewhat variant from those reached by the court when the case was here before (29 Ind. 364), but we are satisfied they are in accordance with the weight of the authorities, and in harmony with the general principles of the law as applicable to such cases. The case of *Ball v. Herbert*, 3 T. R. 253, cited in the former opinion, involved a question as to the right to use the banks of a river for towing boats, and has but little, if any, analogy to the case here. The same may be said with reference to the case of *Blundell v. Catterall*, 5 B. & Ald. 268, which involved the question whether or not the public had a common law right of bathing in the sea, and as incident thereto, of crossing the shore for that purpose. The case of *Dutton v. Strong*, 1 Black, 23, recognized the right of a riparian

owner to erect, for private use, a pier extending into the lake, which served the purpose both of a landing place for freight and for its storage. So do we recognize the right of a riparian proprietor to erect wharves for the landing of vessels navigating the river, but it does not follow that the owner of the pier in the one case, or of the wharf in the other, acquires any rights thereby that can interfere in the use of the lake or river as a common highway by the public. In the former opinion, the following passage is quoted from the opinion of MARTIN, C. J., in the case of *Rice v. Ruddiman*, 10 Mich. 125: "They" (riparian owners) "have the right to construct wharves, buildings, and other improvements in front of their lands, so long as the public servitude is not thereby impaired. They are a part of the realty to which they are attached, and pass with it. Certainly no one can occupy, for his individual purposes, the water in front of such riparian proprietor, and the attempt of any person to do so would be a trespass." It is quite evident, from an examination of that case, that the language above quoted was not intended to convey the idea that no one could temporarily occupy the water in front of such riparian proprietor for the purposes of ordinary navigation, without being a trespasser. The whole statement is made with the qualification that the public servitude was not to be impaired. We quote another passage from the same case, found in the opinion of CHRISTIANCY, J., in which all the judges seem to have concurred.

He says: "But this riparian ownership does not carry with it the right to the exclusive and unrestricted use of the lands ordinarily covered by the water; as in the case of rivers, that use must in all cases be subordinate to the paramount public right of navigation, and such other public rights as may be incident thereto. In other words, all the private or individual use and enjoyment of which the land is susceptible, subordinate to, and consistent with, the public right, belong to the riparian owner as against any other person seeking to appropriate it to his individual use."

From the evidence introduced, and the amount of the ver-

The Jeffersonville, Madison, and Indianapolis R. R. Co. v. Hendricks, Adm'r.

dict, it is apparent that the jury must, under the charge of the court, have allowed the appellee damages for the supposed invasion of his rights, in other boats' being prevented by the boats of the appellants from landing at his wharf.

The entire charge as given being wrong, the judgment will have to be reversed.

There are some questions made as to the pleadings, which, owing to the length of this opinion, we have concluded not to pass upon, inasmuch as when the cause goes back for another trial, the parties can amend their pleadings if they desire to.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

DOWNY, J.—For the reason that the decision in this case, as stated in the foregoing opinion, unnecessarily and improperly subordinates the rights of the riparian proprietor to the mere convenience of the navigator, I cannot assent to it.

C. E. Walker, McDonald, Butler, & McDonald, J. Sullivan, Hendricks, Hord, & Hendricks, Walker & Roberts, and Lincoln, Smith, Warnock, & Stephens, for appellants.

H. W. Harrington and C. A. Korbly, for appellee.

THE JEFFERSONVILLE, MADISON, AND INDIANAPOLIS R. R. CO.
v. HENDRICKS, ADMINISTRATOR.

PRACTICE.—*Rules of Court.—Security for Costs.—New Corporation Succeeding Old.—Liabilities.—Statute of Limitations.*—Where a rule of court requires "an application for security for costs to be made before answering to the complaint, unless answer is made in ignorance of the non-residence, or the plaintiff has become a non-resident since answering," an application on an affidavit which does not disclose the existence of either exception is properly overruled, when the application is first made after the cause has been once tried. Such a rule of court is not repugnant to the laws of this State, unjust,

41	48
128	209
41	48
131	245
133	268
41	48
134	559
41	48
140	64
142	311
41	48
142	110
41	48
163	634
41	48
164	126

41	48
170	395

The Jeffersonville, Madison, and Indianapolis R. R. Co. v. Hendricks, Adm'r.

or unreasonable, and is therefore valid. Where a new trial has been granted, and a new corporation, having succeeded to the rights and liabilities of an old one, is substituted as defendant, the rule will apply to the new corporation, and prevent it from making such application, on the re-trial of the cause, although new issues have been formed. The new corporation is liable as the old, and can make no defence that the old one could not make. If the statute of limitations could not bar the action for the old corporation, it cannot avail the new company.

SAME.—Amendment.—Motion to Strike Out.—Where an amendment to a complaint is made, the question whether the amendment makes a new cause of action, which is barred by the statute of limitations, cannot be raised by motion to strike out the amendment.

COMPLAINT.—Amendment.—New Cause of Action.—Statute of Limitations.—

Where a cause of action by an administrator against a railroad company, as stated in the complaint, was the death of the plaintiff's intestate, caused by the wrongful act or omission of the company, without the fault of the deceased, the particular means or manner of her death not being stated, on a demurrer's being sustained to the complaint, because it did not appear that the injury producing death was not caused by the contributing fault of the deceased, it was not stating a new cause of action, liable to objection as not being brought within the time limited by the statute, to amend the complaint so as to allege the facts of the accident more particularly. It would be a new cause of action, if the amendment contained a recital of facts connected with some other and different accident and date. The cause of action was the wrongful act of the company and the question of fact was what the wrongful act consisted of.

PRACTICE.—Identical Paragraphs.—Motion to Strike Out.—Harmless Error.—

If two paragraphs of a complaint are identical, it is a harmless error for the court to refuse to strike out one of the paragraphs on motion, for that reason.

RAILROAD.—Injury to Passenger.—Fault of Passenger.—Negligence of Railroad Company.—

A paragraph of the complaint in such an action, which alleged that the injury was caused by "defendant not having stopped the motion of the cars a sufficient length of time to allow the deceased to safely and securely leave the cars, but having so far checked the motion thereof that she could safely leave the same, while she was in the act of leaving, suddenly started the train again without giving her a reasonable time to get off, and without want of ordinary care on her part she was thrown violently from the train of cars, and the platform of the depot was so negligently constructed that the foot of said deceased was caught in a hole thereof, and she was run over by the said train," etc., was not liable to the objection that it did not show that the deceased was free from negligence, but did affirmatively show that she was guilty of contributing to the injury received. The allegation that the injury occurred "without want of ordinary care on the part of the decedent," was equivalent to an averment that the injury occurred "without the fault or negligence of the plaintiff." The additional averment was made, "that the defendant was not present in person or by her servants or agents to assist the

The Jeffersonville, Madison, and Indianapolis R. R. Co. v. Hendricks, Adm'r.

deceased from the cars." These averments of the paragraph showed that the deceased was without fault in attempting to leave the train. She had a right to expect the cars to remain stationary long enough for her to step from the train, and to expect the servants of the defendant to be present to assist her.

SAME.—Statute.—Non-Residents.—Constitutional Law.—Section 784, 2 G. & H. 330, was intended to provide a remedy, not only for the resident citizens of this State, but for the citizens of the several states while passing through or residing within this State. Section 2, article 4, of the constitution of the United States, would secure the benefit of this section to citizens of other states, if refused by our law.

SAME.—Foreign Administrator.—Action by.—Trust for Benefit of Widow and Children.—A foreign administrator can maintain an action in this State against a defendant for having wrongfully caused the death of a person. The administrator will hold the money recovered, in trust for the benefit of the widow and children of the deceased. OSBORN, J., dissented from the conclusion that a foreign administrator may bring the suit.

SAME.—Widow and Children.—Averment in Complaint.—It is sufficient to allege in the complaint and prove on the trial, that there are persons who are entitled under the statute to the damages. It is not necessary to name the persons or to amend the complaint so as to state the fact, in the event of the death of any of those persons, leaving heirs, after suit brought.

APPEAL from the Bartholomew Circuit Court.

BUSKIRK, J.—This is the second appearance of this cause in this court. It will be found reported in 26 Ind., commencing on page 228, and ending on page 234. When the case was here before, the judgment of the court below against the appellant was reversed, upon the ground that the complaint did not sufficiently show that the deceased did not cause or contribute to her death by her own negligence. In pursuance of the opinion and judgment of this court, the court below sustained the demurrer to the complaint, and thereupon the appellee filed an amended complaint in two paragraphs.

The first paragraph of the amended complaint avers, omitting the formal parts, that said decedent took passage on the Jeffersonville Railroad, at Jeffersonville, for Columbus, Indiana, on the 31st day of March, 1863; that the agents of said company, in charge of said train, not mindful of their duty and the obligation of the company to safely and securely carry and deliver said decedent at said Columbus,

The Jeffersonville, Madison, and Indianapolis R. R. Co. v. Hendricks, Adm'r.

wholly neglected and refused to do so, but on the contrary, "by their servants and agents, so carelessly, negligently, and unskilfully managed said train of cars, at and near the usual and common place of delivery of passengers at said Columbus, that through said carelessness, negligence, and want of attention of the defendants and their agents and servants, and without want of ordinary care on the part of said Rebecca, said Rebecca was unable to safely and securely get out of and leave said cars at said Columbus; and neither the conductor, nor any other of said defendants, or their agents or servants, were present to assist said Rebecca to safely and securely get from and leave said cars at said Columbus, notwithstanding they well knew that said Rebecca was old and infirm; and the defendants then and there wholly neglected and refused to stop the motion of said cars a sufficient length of time, and allow said Rebecca sufficient opportunity safely and securely to leave said cars, but having stopped said train, and while said Rebecca was in the act of getting off, suddenly started the same again, without allowing her a reasonable time for that purpose, by means of which said Rebecca, in endeavoring to leave said cars, without want of ordinary care on her part, fell and was thrown with great violence from said cars on to the platform, between the platform of the cars and the platform of the depot, at said Columbus, and across the iron rail of said railway track, and was then and there instantly killed," etc.

The second paragraph of the amended complaint, omitting the formal portions, charges that on the 31st day of March, 1863, said Rebecca took passage on, etc., for, etc., as in the first paragraph of complaint; that said defendant failed to deliver said Rebecca safely at Columbus, but on the contrary, "at and near the usual place of delivering passengers at said Columbus, said defendant not having been present, in person, or by their agents or servants, to assist said Rebecca to get from and leave said cars, and said defendants not having stopped the motion of said cars a sufficient length of time to allow said Rebecca to safely and securely

The Jeffersonville, Madison, and Indianapolis R. R. Co. *v.* Hendricks, Adm'r.

leave said cars, but having so far checked the motion thereof that said Rebecca could safely leave the same, and while she was in the act of leaving, suddenly started said train again without allowing said Rebecca a reasonable time to get off; said Rebecca, in attempting to leave said cars, without want of ordinary care on her part, was thrown violently from said train of cars, and the platform of the depot was so negligently constructed that the foot of said Rebecca caught in a hole thereof, and she was run over by said cars," etc.

The complaint, as amended, was filed on the 4th day of December, 1867. Upon the filing of the amended complaint, the defendant filed the affidavit of Horace Scott, general superintendent of defendant's road, setting forth the non-residency of appellee; also the affidavit of Howard Lee, a witness for appellee, to the same effect; and requesting that appellee be required to give bond for costs; and moved the court that appellee be required to give bond for costs; which motion was overruled by the court, and the defendant excepted. And the defendant then, on said affidavits, moved the court that appellee be required to give bond for all further costs in the case; which motion was overruled, and exception taken. Defendant then, on said affidavits, moved the court to dismiss said action for want of bonds for costs as above; which motion was overruled, and exception taken by appellant.

Defendant then moved the court to strike out the second cause of action, as amended, for the reason that the amendment made a new and different cause of action, which did not accrue within two years before the filing of said amended cause of action; which motion was overruled, and defendant excepted. Defendant then moved the court to strike out that part of the second cause of action constituting the amendment, for the reason above given; which motion was overruled and excepted to. Further motions were made, overruled, and exceptions taken, to strike out said amendment, for the reason that it was immaterial and surplusage, and to

The Jeffersonville, Madison, and Indianapolis R. R. Co. v. Hendricks, Adm'r.

strike out said second cause of action, because it was substantially the same as the first cause of action.

To all of which rulings proper exceptions were taken and reserved by bills of exceptions.

The defendant demurred separately to the first and second paragraphs of the complaint, for the want of sufficient facts. The demurrers were overruled, and the defendant excepted.

The defendant filed an answer in two paragraphs to the first paragraph of the complaint, and an answer in three paragraphs to the second paragraph of the complaint.

The first paragraphs are in denial, and the second paragraphs aver that, at and before the time of her decease, said Rebecca was a citizen and resident of the State of Kentucky, and that plaintiff was, at the time of her death, her husband, and was then, and still is, a citizen and resident of Kentucky, and that his letters of administration herein were granted in Kentucky, and that no letters of administration of said estate had ever been granted in the State of Indiana.

The third paragraph of the answer to the second cause of action sets up that said cause of action accrued more than two years before the filing of said paragraph of complaint.

Demurrers were filed and sustained to the second and third paragraphs of the answer, and proper exceptions were taken by the defendant.

The action was commenced and prosecuted up to this point, the 27th day of April, 1869, against the Jeffersonville Railroad Company, when the appellee filed a supplemental complaint, alleging that since the commencement of the action, the said Jeffersonville Railroad Company and the Indianapolis and Madison Railroad Company had consolidated by articles of association, and become a new corporation by the name of The Jeffersonville, Madison, and Indianapolis Railroad Company, and asked that the new corporation be substituted as defendant in the action, which was refused, but the court ordered that said Jeffersonville, Madison, and Indianapolis Railroad Company be made defendant in place of

The Jeffersonville, Madison, and Indianapolis R. R. Co. v. Hendricks, Adm'r.

the original defendant. Whereupon the appearance of appellant was entered, and motions were made, based upon affidavits of the non-residency of appellee, to require him to give bond for costs, which were overruled and exceptions taken; also to require him to give bond for future costs with like result, and to dismiss for want of bond for costs, and for want of bond for future costs, which motions were overruled, and exceptions taken.

Afterward, appellant filed a third paragraph of answer, as follows: And for third paragraph of answer herein, this defendant says that the defendant became a corporation, as alleged in plaintiff's said supplemental complaint, on the 1st day of July, 1866, by consolidation of said Jeffersonville Railroad with the Madison and Indianapolis Railroad Company, and said Jeffersonville Railroad Company then ceased to be a corporation, or to have any existence. And the plaintiff, after said day, could not have and maintain any action for and on account of said alleged death of said Mrs. Hendricks against said Jeffersonville Railroad Company, but said action, by said consolidation, abated, and said Jeffersonville, Madison, and Indianapolis Railroad Company then and there, by virtue of said consolidation, became alone solely responsible to plaintiff for and on account of plaintiff's alleged cause of action, and to be sued therefor in this or another action, and defendant says that more than two years had elapsed since said consolidation of said roads, and since plaintiff's alleged cause of action accrued against this defendant before the filing of said supplemental complaint, making this defendant the party defendant herein, and more than two years had elapsed from the time of the alleged death of said Mrs. Hendricks before making this party defendant herein.

A demurrer was filed and sustained to the above answer, and the defendant excepted.

There was a trial by jury, and verdict for plaintiff, assessing his damages at two thousand seven hundred and fifty dollars. The jury also returned answers to interrogatories.

The Jeffersonville, Madison, and Indianapolis R. R. Co. v. Hendricks, Adm'r.

There was a motion for a new trial overruled, and exception taken, and final judgment on the verdict of the jury.

The appellant has assigned the following errors:

First. The court erred in overruling the several motions of appellant to require appellee to give bond for costs, for future costs, and to dismiss the action for the want of such bonds.

Second. That the court erred in overruling the several motions of appellant relative to the second cause of action, to strike out parts thereof, and the whole of it, for reasons therein assigned.

Third. The court erred in overruling the demurrer to the first paragraph of amended complaint.

Fourth. The court erred in overruling the demurrer to the second paragraph of amended complaint.

Fifth. The court erred in sustaining the demurrer to the second paragraph of the answer to the first paragraph of the complaint.

Sixth. The court erred in sustaining the demurrer to the second paragraph of the answer to the second paragraph of the complaint.

Seventh. The court erred in sustaining the demurrer to the third paragraph of the answer to the second paragraph of the complaint.

Eighth. The court erred in sustaining the demurrer to the third paragraph of the answer to the supplemental complaint.

Ninth. The court erred in overruling the appellant's motion for a new trial.

There are eleven other assignments of error, but they present no question for our decision, as they are a mere repetition of the reasons for a new trial, and are all embraced by the ninth assignment of error, and will be noticed as the reasons for a new trial, when we reach the ninth assignment of error.

We will dispose of the assignments of error in the order in which we have stated them.

The first assignment of error calls in question the correct-

The Jeffersonville, Madison, and Indianapolis R. R. Co. *v.* Hendricks, Adm'r.

ness of the ruling of the court below in overruling the motion to require appellee to give a bond for cost, and in refusing to dismiss the action for the want of the bond.

The issue was joined on the complaint. There was a trial by jury, a verdict for plaintiff, motion for a new trial overruled, and judgment on the verdict. From this judgment there was an appeal to the Supreme Court, and a reversal of the judgment for the want of a sufficient complaint. The cause was remanded to the court below, which sustained the demurrer to the complaint. The appellee then filed an amended complaint. Thereupon the appellant made an application, supported by affidavit, to require the appellee to give security for costs. The motion was overruled. Was this error? It is shown by the record that there was at the time this action was commenced a rule of the court below "requiring applications for security for costs to be made before answering to the complaint, unless answer is made in ignorance of the non-residence, or the plaintiff has become a non-resident since answering." It is not shown in the affidavit, or insisted on in argument, that the appellant was either ignorant of the existence of the above rule, or that the plaintiff was a non-resident at the time the original answer was filed, nor is it shown or claimed that the plaintiff became a non-resident after the answer was filed. The appellant does not come within any of the exceptions to the rule. It is claimed by counsel for appellant, that "the rule is an unreasonable, arbitrary, and harsh rule—one not fit to be made."

The fourteenth section of the act organizing circuit courts provides, that the said courts shall adopt rules for conducting the business therein, not repugnant to the laws of this State, etc. 2 G. & H. 8.

The duty of the circuit courts to adopt rules for conducting the business therein is imperative, and the only limitation as to the character of the rules is, that they shall not be repugnant to the laws of this State. This court, in *Redman v. The State*, 28 Ind. 205, held a rule of court valid which provided, that "an application to change the venue will not

The Jeffersonville, Madison, and Indianapolis R. R. Co. v. Hendricks, Adm'r.

be entertained after the day the cause is docketed for trial, nor will such application be entertained after the party making the same has applied for a continuance which has been overruled," upon the ground that it was not repugnant to the laws of this State, and such ruling was adhered to in *Galloway v. The State*, 29 Ind. 442. See *Whittem v. The State*, 36 Ind. 196, and *Truitt v. Truitt*, 38 Ind. 16.

The language of the statute upon this subject, after providing that non-resident plaintiffs shall give bonds for costs, is, that "the suit shall not be dismissed for want thereof, if the plaintiff will file, in open court, upon being ordered to do so, such undertaking," etc. 2 G. & H. 228, sec. 402.

A rule might be "repugnant to the laws of this State," which was not in conflict with any statute of the State. A rule which would deprive a party of any right secured to him by the constitution or the principles of the common law in force in this State would be repugnant to the laws of this State. A rule of court should be reasonable, and adapted to a prompt and just administration of justice. The statute requires many things to be done, without prescribing the time when, or the manner in which, they shall be done, such as granting continuances and changing the venue, and the filing of pleadings, or the like. It is also competent for the court to determine by rule when an application for security for costs shall be made. If the court below had adopted a rule that "no application for security for costs should be made after an answer had been filed," we should have regarded such a rule as unreasonable and repugnant to every principle of justice, and therefore repugnant to the laws of this State; for under such a rule a defendant might answer honestly, believing that the plaintiff was still a resident of the State, when in fact he had become a non-resident of the State, without the knowledge of the defendant, before he had commenced his action, or he might remove from the State after an answer had been filed. The rule of the court below properly guards against such contingency. We cannot see that any injustice is done to a defendant who has full knowl-

The Jeffersonville, Madison, and Indianapolis R. R. Co. *v.* Hendricks, Adm'r.

edge that the plaintiff is a non-resident of the State, but answers the complaint without asking an order for security for costs, by depriving him of the right of making an application for such order afterward.

We are referred to the case of *Griggs v. Voorhies*, 7 Blackf. 561, as an authority in point in favor of appellant. We do not think so, for several reasons. In that case there was no rule of court prescribing the time when such an application should be made, as there is in this. In that case the court say: "Before the defendant pleaded, he moved for a rule on the plaintiffs to show cause why they should not give security for costs, founded on an affidavit stating that they were not residents of the State of Indiana," while, in the case in judgment, the application was not made for about four years after the defendant had pleaded to the complaint.

Besides, there is a significant change of language in the enactment of 1852, above referred to, from that used in the act of 1843, under which *Griggs v. Voorhies*, 7 Blackf. 561, was decided. In the act of 1843 it is provided, that the action shall not be dismissed if the bond is filed in open court "within such time as the court shall deem reasonable." R. S. 1843, p. 675, sec. 33. In the act of 1852 it is provided, that the action shall not be dismissed, if the plaintiff files his bond "upon being ordered to do so." The only discretion given to the court by the act of 1843 was as to the time of filing bond. By the act of 1852, the action cannot be dismissed until the plaintiff fails to comply with an order of the court requiring it to be filed.

This leaves it in the power of the court to refuse to make the order at all, and hence to prescribe under what circumstances it would so refuse. It would certainly be more just and proper toward all parties coming before the court that they should understand, by a general rule of the court, entered of record, and open to the inspection of all, under what circumstances the court would refuse to make the order, than to leave it for determination in each case whether the order should be made or refused.

The Jeffersonville, Madison, and Indianapolis R. R. Co. *v.* Hendricks, Adm'r.

In our opinion, the rule in question was neither repugnant to the laws of this State, unjust, nor unreasonable, and was therefore valid.

But it is claimed that even under this rule appellants had the right to demand the bond for costs at any time before answering to a good complaint, and as this court had held the complaint defective, appellants had the right to insist upon the bond at any time before answering to a complaint which should be held sufficient.

It is a complete answer to this position, that the rule makes no such provision. The rule requires the motion to be made before filing answer, and if, as in this case, the defendant chooses to answer an insufficient complaint, he cannot say that he has not filed an answer in the action. Furthermore, the spirit of the rule, the reason of it, and for its propriety, as shown above, all are against such a position.

But it is still further insisted by counsel for the appellant, that when the appellant was made a party, in place of The Jeffersonville and Indianapolis R. R. Co., she had the right to insist upon security for costs.

By the articles of consolidation of the Indianapolis and Madison and the Jeffersonville railroad companies, which are in the record, it is expressly stipulated that "all debts and liabilities, of whatever name and description, of each of said original companies, shall be assumed by said Jeffersonville, Madison, and Indianapolis Railroad Company, and faithfully observed and discharged, in the same manner as the said original companies respectively were bound to observe and discharge the same." The liability of the Jeffersonville company for the death of plaintiff's intestate, if any there be, existed long before this consolidation, and by the above stipulation, the new company created by the consolidation assumed its payment and discharge, to all intents and purposes, the same as if no consolidation had taken place. Appellant's counsel insists that, by the very act of consolidation itself, the old Jeffersonville company ceased to exist, for all purposes whatever, and he speaks of it as an extinct corporation. Now,

The Jeffersonville, Madison, and Indianapolis R. R. Co. v. Hendricks, Adm'r.

for the sake of the argument, take his position as correct, and yet no such consequence follows from it, as he claims. It certainly will not be pretended that this consolidation was attended with consequences more unfavorable to plaintiff than the death of a natural person defendant. In such case, the administrator would be substituted and the cause proceed, with the rights of the parties fixed up to the death of defendant. If the decedent could not have required security for costs at the time of his death, neither can the administrator after his substitution. This, we think, is manifest. Now, in the case at bar, there is no death or other casualty beyond the control of the parties affecting this case; but with full notice of the pendency of this action, which the law presumes, The Madison and Indianapolis Railroad Company agrees with the Jeffersonville company to combine their two separate corporate existences into a new corporation, and stipulates that all liabilities shall be discharged in the same manner as the original companies were bound to discharge them. Thus, by the very terms of the contract creating the new company, they have placed it in all respects in precisely the same situation, as to this case, in which the original Jeffersonville company stood; and hence it had no right to demand security for costs, if that company had none.

We are fortunately not without authority as to the legal effect of the consolidation of two or more railroad companies. The question was for the first time presented to this court in the case of *The I., C., & L. R. R. Co. v. Jones*, 29 Ind. 465. The court say: "By the consolidation, both of the old companies ceased to exist separately, and all their effects and franchises were vested in the new company. The two corporations became merged in one. We cannot imagine how the Indianapolis and Cincinnati Railroad Company could afterward be sued. Upon whom would process be served? It ceased to have any officers or agents. It ceased to be a separate legal entity. Instead of two, there was now but one corporation, made up of the mingled elements of the two pre-existing companies, so combined and merged

The Jeffersonville, Madison, and Indianapolis R. R. Co. v. Hendricks, Adm'r.

that neither could be separately identified, or brought into court. But what are the rights of creditors and persons upon whom torts have been committed by the vanished corporations? A dead man may have an administrator to represent his estate and answer to suits, but a corporation lawfully disappearing thus, has no estate to be administered. Its assets have lawfully vested in the new consolidated corporation. Must lawful claims be lost, then? That result cannot follow. The legislature has chosen to make no provision upon the subject, and the industry of counsel, as well as our own examination of the books, has failed to discover any direct authority upon the question before us. The analogies of the law, too, afford little aid in its solution. We regret to be compelled to decide it without a more thorough argument. Giving it, however, the best consideration of which we are capable under the circumstances, we have reached the conclusion that, for the purposes of answering for the liabilities of the constituent corporations, the consolidated company should be deemed to be merely the same as each of its constituents, their existence continued in it, under the new form and name, their liabilities still existing as before, and capable of enforcement against the new company in the same way as if no change had occurred in its organization or name. The doctrine seems to spring from the necessities of justice, and, so far as we are able to foresee, cannot result in wrong or embarrassment."

The question again came before the court, in the case of *Paine v. The Lake Erie & L. R. R. Co.*, 31 Ind. 283, where the court say: "It is clear to our minds, that the new company succeeded to the rights of the old corporations. The new was composed of the elements of the old; it was the same under a new form. It is only a play upon words to say, that phoenix-like the new arose from the ashes of the old. There was no turning to ashes necessary in the process. It only required a commingling of the elements of which the old was composed. The new assumed the liabilities and succeeded to the rights of the old."

The Jeffersonville, Madison, and Indianapolis R. R. Co. v. Hendricks, Adm'r.

The next assignment of error presents for review the refusal of the court to sustain the motions of the appellant, first, to strike out the second cause of action entire, as amended; second, to strike out the interlineations; third, to strike out the interlineations and restore the erased words; and fourth, to again strike out the second paragraph as amended entire, but for different reasons than those assigned for the first motion; all of which were overruled, and the appellant excepted.

The reason assigned in support of the first two motions is, "that the amendment made a new and different cause of action, which did not accrue within two years before the filing of said amended cause of action." The purpose of the appellant was to raise the question of whether the cause of action set up in said paragraph was barred by the statute of limitations. This cannot be done by a motion to strike out. The statute of limitations must be pleaded whenever there is an exception in the statute. In such case it cannot be raised by demurrer, although it appears upon the face of the complaint that the action is barred. The reason of the rule is, that the plaintiff should have the right to reply the exception. *Bowman v. Mallory*, 14 Ind. 424; *Matlock v. Todd*, 25 Ind. 128; *Boyd v. Boyd*, 27 Ind. 429; *Perkins v. Rogers*, 35 Ind. 124.

But where there are no exceptions to the statute, and the facts appear upon the face of the complaint, the question can be raised by demurrer. *Hanna v. The Jeffersonville Railroad Company*, 32 Ind. 113.

The appellant "moved to strike out the second cause of action, as amended, because the interlineation therein by way of amendment of the original complaint, which reads as follows: 'was so negligently constructed that the foot of said Rebecca caught in a hole thereof, and she,' with the erasure of the following words, by way of said amendment, to wit, 'upon the track and,' makes a new and different cause of action, and without said interlineation, and with said erased words restored, said second cause of action is the same, and

The Jeffersonville, Madison, and Indianapolis R. R. Co. v. Hendricks, Adm'r.

not different from the first cause of action, and more than two years had elapsed since said alleged cause of action accrued when said amended complaint was filed."

The first reason assigned in support of the above motion is, that the second paragraph of the complaint, as amended, set up a new and different cause of action from that contained in the first paragraph of the complaint, and that such new cause of action had not accrued within two years.

The learned counsel for appellant has furnished us a very able and elaborate brief, but it seems very manifest to us that he has entirely misconceived the legal effect of the amendments made to the second paragraph of the complaint. His entire argument on that subject is based upon the assumption that the second paragraph of the complaint, as amended, stated a new and different cause of action from that set up in the original complaint. In our judgment, the assumption is unsupported by the facts as they appear of record. In our opinion, the cause of action, as set forth in the two paragraphs of the complaint, as amended, is the same as, and identical with, that set forth in the original complaint. It is neither new nor different. The cause of action, as set forth in the original and amended complaints, was the death of Mrs. Hendricks, caused by the wrongful act or omission of The Jeffersonville Railroad Company, and without fault on her part, and not the particular means or manner of her death. This court reversed the former judgment of the court below, in this case, because it did not sufficiently appear in the original complaint that she did not contribute to her own death. When the cause was remanded, the court below sustained a demurrer to the complaint. The appellee then amended the complaint by stating more fully and clearly the facts and circumstances, as they existed at the time of the death of the decedent, for the purpose of showing that the death of the decedent was caused by the wrongful acts of the appellant, and without the want of ordinary care on the part of the decedent. The new facts stated relate to the time and fact of the death of the decedent, as alleged in the orig-

The Jeffersonville, Madison, and Indianapolis R. R. Co. v. Hendricks, Adm'r.

inal complaint. The position of the counsel for appellant would be correct if the new facts stated related to a time and transaction different from the one set out in the original complaint. The cause of action arose, if at all, the moment the death was caused by that company's wrongful act, and it then only became a question of fact, and hence of evidence, what really was the wrongful act. It might have been by an improper management of the train, a want of proper attention in assisting her to leave the train, want of light at the depot, or a defective and insecure platform at the depot acting as a trap to catch passengers alighting from the train in the night. Or instead of being any one of these causes singly, a part or all of them may have combined to produce the result. Yet they were, any or all, but simply the means in causing the death, for which the company is responsible. Hence it would have been manifest error to have stricken out any one of no matter how many allegations of means causing the death; and consequently the court did right to overrule all motions aimed at accomplishing that object.

The reason assigned in support of the fourth motion is, that the second paragraph of the complaint, as amended, was the same as the first. We do not think so. There is an allegation in the second paragraph of the complaint in regard to the negligent construction of the platform of the depot that is not in the first. But conceding that the paragraphs were the same, it would be a harmless error for the court to refuse to strike it out. *Cheek v. Glass*, 3 Ind. 286; *Lamson v. Falls*, 6 Ind. 309; *Van Pelt v. Corwine*, 6 Ind. 363; *Thomas v. White*, 11 Ind. 132; *Pennington v. Nave*, 15 Ind. 323.

In our opinion, the court below committed no error in overruling the motions of the appellant above set out.

The third assignment of error is based upon the action of the court in overruling the demurrer to the first paragraph of the amended complaint. The counsel for appellant has not pointed out, in argument, any objection to such paragraph, and we have been unable to discover any, and, there-

The Jeffersonville, Madison, and Indianapolis R. R. Co. v. Hendricks, Adm'r.

fore, conclude that the court committed no error in overruling the demurrer thereto.

The fourth assignment of error calls in question the correctness of the ruling of the court in overruling the demurrer to the second paragraph of the amended complaint. The principal ground upon which it is argued that this demurrer should have been sustained is, that the count does not show that there was no want of negligence on the part of deceased, but affirmatively shows negligence by showing that she left the train while it was in motion. The language of this paragraph on that subject is as follows:

"Said defendant not having stopped the motion of said cars a sufficient length of time to allow said Rebecca to safely and securely leave said cars, but having so far checked the motion thereof that said Rebecca could safely leave the same, while she was in the act of leaving, suddenly started said train again without allowing the said Rebecca a reasonable time to get off; said Rebecca in attempting to leave said cars, without want of ordinary care on her part was thrown violently from said train of cars, and the platform of the depot was so negligently constructed that the foot of said Rebecca was caught in a hole thereof and she was run over by the said train," etc.

The allegation above, admitted by the demurrer to be true, is that the motion of the train was so far checked that deceased could safely leave the same. If she could safely leave, so far as any risk from the motion of the train was concerned, then she ran no risk, and it was not negligence on her part to make the attempt. It would be a contradiction of terms to say that it was negligence on her part to undertake to do what she could safely do. We are aware of the general doctrine of this court and of other courts, that it is negligence for a passenger to attempt to leave a train while it is in motion. But this doctrine must be applied with some reason, and not carried to absurd extremes. It will certainly not be contended, or at least sanctioned by any court;

The Jeffersonville, Madison, and Indianapolis R. R. Co. v. Hendricks, Adm'r.

that when a train of cars has arrived at any depot where the trains of the company always stop, and the motion of the train has so far ceased that a passenger can securely leave the train, so far as any risk from the motion of the train is concerned, the least possible perceptible motion of the train renders it negligence in the passenger to leave the train, and deprives him of any right of action for an injury in no way resulting from, or attributable to, the motion of the train when he attempted to leave, but entirely from a defect in the platform for landing, which he had a legal right to presume perfect, and from a sudden starting of the train after he attempted to leave, all which dangers were increased by the absence of any light to enable him to discover and shun that and other dangers. Fortunately we are not without authority upon this subject from this court.

In *The Evansville and Crawfordsville R. R. Co. v. Duncan*, 28 Ind. 441, this court, on page 447, in sustaining the refusal of the lower court to give an instruction, says: "The instruction, however, assumes that leaping from a car under any circumstances, without a purpose to avoid thereby an apprehended peril to life or limb, would relieve the carrier from liability. We do not so understand the law.

"If the leap was made under such circumstances that a person of ordinary caution and care would not have apprehended danger therefrom, then it was not such an act of carelessness as would relieve the defendant from the responsibility otherwise resting upon it."

When this case was in this court before, the court, in speaking of the question of whether it was sufficiently alleged in the complaint that the deceased did not contribute to her own death, said: "It is carelessness in passengers to attempt to leave the train whilst it is in motion." It seems to us that the above proposition of law was too broadly stated, and should have been qualified. The law as stated by this court, in *The E. & C. R. R. Co. v. Duncan*, *supra*, is a reasonable and proper modification of the law as laid down in this case heretofore.

The Jeffersonville, Madison, and Indianapolis R. R. Co. v. Hendricks, Adm'r.

It is in the next place insisted by counsel for the appellant that the averments in the said paragraph of the complaint are not sufficient to show an absence of contributory negligence on the part of the decedent.

This court, in the case of *The E. & C. R. R. Co. v. Dexter*, 24 Ind. 411, in discussing what averments, as to contributory negligence on the part of plaintiff, had to be made in the complaint, laid down the law thus: "The averment must be either expressly made in the complaint, that the injury occurred without the fault or negligence of the plaintiff, or it must clearly appear from the facts which are alleged, that such must have been the case."

We will first inquire whether there is an express averment that the injury occurred without the fault or negligence of the decedent. It is averred in the complaint that the injury occurred "without the want of ordinary care on the part" of the decedent. Is such an averment equivalent to an averment that the injury occurred without the fault or negligence of the plaintiff? A passenger is bound to use ordinary care and prudence to avoid injury. If a passenger is not guilty of the "want of ordinary care and prudence," then he has exercised ordinary care and prudence. The two expressions mean the same thing, and are used interchangeably by the courts and elementary writers. Thus, when this case was here before, the court said: "Two things must concur to enable the plaintiff, in such a case, to recover, viz., negligence on the part of the defendant and no want of ordinary care on the part of the plaintiff which directly contributed to the injury."

In like manner, Redfield on Railways: "To the liability of a railway company, as passenger carriers, two things are requisite; that the company shall be guilty of some negligence or omission which, mediately or immediately, produced or enhanced the injury, and that the passenger should not have been guilty of any want of ordinary care and prudence, which directly contributed to the injury; since no one can recover for an injury of which his own negligence was in

The Jeffersonville, Madison, and Indianapolis R. R. Co. v. Hendricks, Adm'r.

whole or in part the proximate cause." See *Robinson v. Conc*, 22 Vt. 213; *Butterfield v. Forrester*, 11 East, 60; *Simpson v. Hand*, 6 Whart. 311; *Rathbun v. Payne*, 19 Wend. 399; *Barnes v. Colc*, 21 Wend. 188.

The averment in the complaint under consideration is in the exact words used by this court in this case when it was here before. In our opinion, the averment is sufficient.

The doctrine laid down by this court, in the case of *The E. & C. R. R. Co. v. Dexter*, *supra*, that the complaint will be sufficient, if "it must clearly appear, from the facts which are alleged, that the injury occurred without fault or negligence on the part of the plaintiff," was approved of and followed by this court, in the case of *The I. & C. R. R. Co. v. Paramore*, 31 Ind. 143.

We proceed to inquire whether the facts alleged in said paragraph of the complaint clearly show that the injury occurred without fault or negligence on the part of the decedent. What are the facts stated? They are, that the said defendant failed to deliver said Rebecca safely at Columbus, but, on the contrary, "at and near the usual place of delivering passengers at Columbus, said defendant not having been present, in person, or by their agents or servants, to assist said Rebecca to get from and leave said cars, and said defendants not having stopped the motion of said cars a sufficient length of time to allow said Rebecca to safely and securely leave said cars, but having so far checked the motion thereof that said Rebecca could safely leave the same, and while she was in the act of leaving, suddenly started said train again without allowing said Rebecca a reasonable time to get off; said Rebecca, in attempting to leave said cars, without want of ordinary care on her part, was thrown violently from said train of cars, and the platform of the said depot was so negligently constructed that the foot of the said Rebecca caught in a hole thereof, and she was run over by said cars."

Four separate and distinct charges of negligence are made against the railroad company; first, that the company was not

The Jeffersonville, Madison, and Indianapolis R. R. Co. *v.* Hendricks, Adm'r.

present, in person or by her agents or servants, to assist the deceased from the cars; second, that the train of cars did not stop long enough to enable passengers to safely and securely leave the cars; third, that the train of cars stopped long enough to induce the decedent to believe that she could safely and securely leave the cars, and while she was attempting to do so, the train was suddenly started again, and by means thereof she was violently thrown from the cars; fourth, that the platform of the depot was so negligently constructed that the foot of the decedent was caught in a hole thereof, and while thus held fast, was run over by said train of cars, and was then and there crushed to death.

Do not the facts clearly and conclusively show that the decedent was not in fault? Was not the attempt of the decedent to leave the cars, under the facts stated, "made under such circumstances that a person of ordinary caution and care would not have apprehended danger therefrom?" If it was, then the decedent was without fault or negligence; and in our opinion, the decedent was not guilty of negligence in attempting to leave the train under the circumstances. The train having very nearly come to a full stop, the decedent had the right to suppose that it would stop long enough for her to leave the train; and she also had the right to suppose that some of the agents of the company would be present to aid and assist her in leaving the cars, and if her just expectations had been realized, she could and would have safely left the train.

It is also insisted by the appellant that the demurrer should have been sustained, for the reason that the representative character of the plaintiff is not sufficiently shown. We think otherwise. That question was correctly decided against appellant when this case was here before.

We are of the opinion that the court committed no error in overruling the demurrer to the second paragraph of the complaint.

The point next relied upon for a reversal, and most elaborately presented by appellant's counsel, is in substance as

The Jeffersonville, Madison, and Indianapolis R. R. Co. v, Hendricks, Adm'r.

follows: Said Rebecca was, at the time of her decease, a citizen and resident of Kentucky, and her administrator (appellee) was appointed by the State of Kentucky, and not by this State. This action being based upon a statute of this State, cannot be maintained under these circumstances, for the statute only gives the right to an administrator appointed under the authority of the laws of this State, to bring such a suit, and it can only be maintained for the wrongfully causing the death of a citizen or resident of Indiana at the time the death occurs.

The question just stated is based upon the action of the court in sustaining the demurrer to the second paragraphs of the answers to the first and second paragraphs of the complaint, the substance of which answers has been heretofore stated in this opinion.

The question presented is new and important, and we have given it that thoughtful and mature consideration which its novelty and magnitude demand.

This action is based on the following statute:

"Sec. 784. When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed five thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." 2 G. & H. 330.

The first branch of this proposition presents the question whether section 784, 2 G. & H. 330, applies exclusively to a resident of the State of Indiana whose death is caused by the wrongful act or omission of another, or whether it extends to all cases of death so caused within this State, regardless of the place of residence of the deceased. It would seem as though the language of the act itself was so

The Jeffersonville, Madison, and Indianapolis R. R. Co. v. Hendricks, Adm'r.

perfectly clear and explicit that this question could not arise. It provides, that, "when the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission." The last clause of the above quotation contains the only condition which must exist as a pre-requisite to the maintenance of the action which the legislature has seen fit to impose. They have not said that the right shall exist only in cases where the deceased was, at the time of his death, a resident or citizen of Indiana; but, given the fact that the death of one has been caused by the wrongful act or omission of another, they leave for the courts solely the inquiry whether, had the injury not been fatal, the injured party could himself have recovered therefor.

The above section of the code does not limit the remedy provided for causing the wrongful death of another to resident citizens of this State, and we possess no power to thus limit the operation of the section. Nor do we believe that the legislature had an intention to confine the remedy to resident citizens of this State. The second section of article 4 of the constitution of the United States provides, that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Judge WASHINGTON, in *Corfield v. Coryell*, 4 Wash. C. C. 371, held that the above section conferred "the right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus*; to institute and maintain actions of any kind in the courts of the state," etc.

There can be no doubt that the citizen of any other state has the clear and undoubted right to pass through or reside in this State, and for any injury done to his person, property, or reputation, he may institute and maintain an action in our courts. This right is secured by the federal constitution,

The Jeffersonville, Madison, and Indianapolis R. R. Co. *v.* Hendricks, Adm'r.

which is the paramount law, and our statute gives to the personal representatives an action in case of death where the person injured could maintain an action when death did not occur. The comity which exists between the American states renders it unreasonable to suppose that our legislature intended to deny to the citizens of the several states the full and equal protection of our laws. If the legislature of this State possessed the power, and should attempt to exercise it, to deny to the citizens of the other states, passing through or residing in this State, the full and just protection of our laws, it would result in retaliation. Under such a system, there would be no security or protection for the persons, lives, or property of American citizens beyond the limits of their respective states. Such a union of states would not be worth preserving.

In our opinion, the section under examination was intended to provide a remedy, not only for the resident citizens of this State, but for the citizens of the several states while passing through or residing within this State.

But it is earnestly insisted by counsel for appellant, that the court erred in sustaining the demurrer to such paragraph of the answer, for the further reason that a foreign administrator cannot maintain an action in our State for wrongfully causing the death of a person. In our opinion, this question was decided adversely to the appellant when this case was formerly in this court, but we will meet and decide it again. The argument is this: that when the act was approved, which gives to a foreign administrator the right to sue in the courts of this State, section 784 of the code, upon which this action is based, had not been approved. The act in reference to the settlement of decedents' estates was approved on the 17th day of June, 1852, while the civil code was not approved until the 18th day of June, 1852.

In our opinion, the point is not well taken. These acts were passed by the first legislature which assembled after the adoption of the present constitution. Upon that legislature was devolved the duty of perfecting a general system

The Jeffersonville, Madison, and Indianapolis R. R. Co. v. Hendricks, Adm'r.

of laws which would be applicable and conformable to the new constitution. The only limitation placed upon the power of a foreign administrator to sue is, that he shall sue "in like manner and under like restrictions as a resident administrator." Can it be doubted that a resident administrator could maintain such an action? The act conferring upon foreign administrators the power to sue does not restrict such right to such actions as were then authorized to be brought. The power conferred, in our opinion, applied not only to such causes of action as then existed, but to such as might afterward be created. If we should hold that a foreign administrator cannot sue, in a case like the one in judgment, because the right of action had not then been created, we should have to hold that a resident administrator could not maintain such an action, for the reason that the foreign administrator may maintain any action that a resident administrator may. Such a ruling would completely defeat any action under section 784 of the code, for that expressly provides that the action shall be brought by the personal representatives of the decedent. It is our duty to execute, and not to defeat, the plain and undoubted intention of the legislature.

It is also insisted by counsel for appellant, that a foreign administrator cannot maintain such an action, for the reason that section 784 of the code has no extra-territorial operation. But in our opinion the doctrine contended for has no application to the case in judgment, as the action is brought in the state where the right and remedy are given.

But another reason assigned why the court should hold that a foreign administrator cannot maintain this action is, that the act provides that the recovery shall be for the benefit of the widow and children, if any, or next of kin, and inasmuch as by common law the distribution of a decedent's estate is governed by the law of the residence of decedent at the time of his death, therefore the legislature is to be presumed to have intended that the person for whose death

The Jeffersonville, Madison, and Indianapolis R. R. Co. v. Hendricks, Adm'r.

the recovery is had was a resident of Indiana, and the distribution is to be in accordance with our laws.

The evil to be remedied by this legislation was to provide for some pecuniary compensation, to be made by one person for taking the life of another, which before this enactment he could not have been required to make. Now, it was in the power of the legislature to have devolved the right of action for the recovery of this compensation upon whomsoever it pleased; as in case of the death of a child, for causing which, by section 27 of the code, 2 G. & H. 56, the father, etc., may bring suit. It was a mere matter of choice of persons by the legislature as to who should have the right to sue. In this case it chose to devolve the right upon the personal representatives. Having thus conferred the right of action, and directed who should prosecute it, had they stopped here, it would have been inferable, at least, that the fund recovered would have been simple assets of the estate, to be disposed of as other assets. But having created this fund, the legislature had the right to determine what should become of it, and who should be benefited by it; and in the exercise of that right, the fund itself is charged with the express trust that it must inure exclusively to the benefit of the widow and children, if any, first, and if no widow or children, then to the next of kin of deceased. Upon each and every farthing recovered in an action of this kind is ineffaceably impressed a trust of the most high and sacred character.

We will not indulge the presumption that the courts of the State of Kentucky would permit a fund created by a sovereign state, charged in its inception with so sacred a trust, to be squandered or diverted from its legitimate objects. The damages recovered in this action must inure to the exclusive benefit of the children of the deceased. The administrator will hold it in trust for them, and they can doubtless enforce the faithful execution of such trust. But the question which we have to decide is not the proper dis-

The Jeffersonville, Madison, and Indianapolis R. R. Co. v. Hendricks, Adm'r.

tribution of the money recovered, but whether the appellee is entitled to recover any damages.

In our opinion, the court committed no error in sustaining the demurrer to the second paragraph of the answer.

The next error assigned presents for our decision the question whether the court erred in sustaining the demurrer to the third paragraph of the answer, setting up as a defence to the second paragraph of the complaint, that the cause of action therein set forth had not accrued within two years. What we have already said in reference to the legal effect of the amendment to the second paragraph of the complaint, virtually disposes of this assignment of error. If we are right in the conclusion reached, that there was no new cause of action stated in the amended complaint, it necessarily and unavoidably results that the original cause of action was not barred; and as the statute of limitations was only pleaded to the new cause of action, and not to the old one, the court committed no error in sustaining the demurrer to such answer.

The same defence was pleaded to the supplemental complaint making the consolidated company a defendant. What we have hereinbefore said, in reference to the legal consequences of the consolidation of said companies, very clearly shows that the consolidated corporation could make no defence which The Jeffersonville Railroad Company could not have made.

We now proceed to inquire whether the court erred in overruling the motion for a new trial.

In the first place, it is insisted that the court erred in giving and refusing to give certain instructions. We have carefully examined the instructions given and those asked by appellant and refused by the court, and are entirely satisfied that the court committed no error in giving or refusing to give instructions. We do not believe that any useful purpose would be accomplished by setting out in this opinion the instructions given or refused, except the twelfth instruction given, which reads as follows: "While, as matter of law, it

The Jeffersonville, Madison, and Indianapolis R. R. Co. v. Hendricks, Adm'r.

may be necessary to insert the names of the decedent's children in a complaint for damages prosecuted for their benefit, the death of one or more of her said children occurring after suit is brought, although such deceased children may have left children of their own, does not abate the suit, even if such death be not stated in the complaint, or the names of their children be given. The administrator is the party plaintiff, and the necessity for alleging the names of the children arises out of the law which authorizes the maintenance of this class of actions only in case there are next of kin who may have sustained injury. It will be sufficient to justify your finding for plaintiff, so far as any question concerning her next of kin is concerned, if you find that she actually left surviving her children."

The defendant below asked instructions on this point as follows:

1st. The proof as to the names of the husbands and next of kin must correspond with the names given in the complaint.

2d. If any of decedent's daughters were married, their names by marriage should have been given in the complaint.

3d. And the names of their husbands should also be set forth in the complaint.

4th. If any of the daughters were married, and have died since the commencement of the action, leaving children, the names of the children should have been made to appear in the complaint by supplemental complaint, or otherwise, and not so appearing, the jury must find for the defendant.

The instructions so asked were refused, and exceptions taken.

In our opinion, the instructions asked by the appellant were correctly refused, and the one given by the court was as favorable to the appellant as the law will justify.

The law upon this subject is stated as follows by this court, in *The I., P., & C. R. R. Co. v. Keeley's Adm'r*, 23 Ind. 133: "The right to sue is given to the personal representative of the deceased, and the action is prosecuted in his name; but

The Jeffersonville, Madison, and Indianapolis R. R. Co. *v.* Hendricks, Adm'r.

the damages 'must inure to the exclusive benefit of the widow and children, or next of kin,' and therefore the action is, in effect, prosecuted for their benefit. If there were no wife, children, or next of kin surviving the deceased, capable of taking under the statute, the action would not lie. It is therefore clear that the complaint must at least aver that there are such persons to whom, under the statute, the damages inure. It is an issuable fact that may be controverted, and must be alleged in the complaint; and, if denied, must be proved to sustain the action." The court, in a subsequent part of the opinion, said that the better practice would be to state the names of such persons in the complaint, but we are of the opinion that it will be sufficient to allege in the complaint, and prove on the trial, that there are persons who are entitled, under the statute, to the damages. We hold that it is not necessary to give the names of such persons in the complaint, but such allegation would not vitiate. The husbands of the married daughters of the deceased are not entitled to the money, and, therefore, need not be named. The children of the deceased daughters would inherit their shares.

It is next claimed that the damages assessed were excessive. We do not think so. The question of damages was fairly submitted to the jury, and we see no reason for disturbing their finding.

It is finally claimed by appellant that the verdict is not sustained by sufficient evidence. We think otherwise. How it would be possible more clearly to show the facts necessary to justify, and even demand, a verdict such as was rendered in this case, we cannot discover. The mangled corpse, admitted to be that of Mrs. Hendricks, showed the death. The depositions of her daughters and others as to the time she left her home in Lexington show it to have been impossible for her to have reached Columbus on any other than the night train up of the night she was killed. The hole in the platform of the depot, forming the trap in which her foot was caught, is conclusively proven, and her foot was

The Jeffersonville, Madison, and Indianapolis R. R. Co. v. Hendricks, Adm'r.

still there fast when one of the coroner's jury found her the next morning. The hole was at the outer edge of the platform, tapering from the edge inwardly, of such shape and size that it would have been impossible for her to have inserted her foot into it, as it was, without having stepped from the car on to the platform. There was no light on the platform or in the depot. Although she was old and fleshy, and must have been, to some extent, helpless, neither conductor, brakeman, nor other employee of the company appeared, to render her any assistance in finding her way off from the train, through the darkness, on to a secure part of the platform, but, after midnight, she was left to grope her way over a broken platform of a depot, with which she was unacquainted, by the help only of the dim light of the stars; and, to add to her embarrassments, no sooner had the train stopped, or come to a very slow motion, than it almost instantaneously started again.

It seems to us that this evidence inevitably leads to the conclusion arrived at by the jury in their answer to the third special interrogatory propounded to them by the appellants, viz.: "when she stepped from the car, it being dark, she stepped in the hole on the platform at the place of delivery, and was caught by the car or cars, and fell, was drawn or thrown under and run over by the same;" as well as the conclusion stated in answer to the fifth interrogatory, whereby, having answered the fourth, that her death was caused by the negligence of the railroad company, they proceed to explain how, as follows: "failure in the conductor's being present to assist her to safely land, and negligence on the part of the defendant to have the place of delivery in proper order, and want of proper light at the same."

The evidence very clearly shows that the agents and employees of the appellant were guilty of gross negligence, and we have been unable to find any fact or circumstance which mitigated their conduct. The verdict of the jury and their answer to the interrogatories were fully sustained by the evidence.

The Sand Creek Turnpike Company *et al.* v. Robbins *et al.*

The judgment is affirmed, with costs, and with five per cent. damages.*

OSBORN, J., dissents from so much of the above opinion as holds that the suit was properly brought by the foreign administrator.

S. Stansifer, for appellant.

R. Hill and *G. W. Richardson*, for appellee.

*Petition for a rehearing overruled.

41	79
380	552
41	79
143	356

THE SAND CREEK TURNPIKE COMPANY ET AL. v. ROBBINS ET AL.

INJUNCTION.—*Verification of Complaint.*—*Restraining Order.*—No verification of a complaint for injunction is required, where no restraining order or temporary injunction is sought before final judgment.

TURNPIKE.—*Omitted Lands.*—*Correction by Appraisers.*—*Acts of 1867, 1869.*—*Proviso.*—Where in assessing lands for a turnpike road, there have been casual omissions of tracts of land, by the assessors appointed by the county commissioners, such omissions may be corrected, and such completed assessment may be answered by way of defence to the further prosecution of a suit to enjoin the collection of the assessment because of such irregularity. Upon the discovery of any omission of lands liable to be assessed, the county commissioners may, of their own motion, or at the instance of any one interested, reassemble the appraisers and require the proper correction to be made and direct the treasurer to add the same to the duplicate. The entire assessment is thereupon rendered valid. And the proviso in the repealing clause of the act of 1869, saving acquired rights under the act of 1867, authorizes a company which was under this act entitled to have an appraisement made, to avail itself of such amendment of the appraisement, after suit instituted against such company because of such omissions.

APPEAL from the Decatur Circuit Court.

WORDEN, J.—This was an action by the appellees against the appellants to enjoin the collection of certain gravel road assessments upon the property of the plaintiffs, all the land within the specified distance from the road not being listed and returned. The case has once before been in this court,

The Sand Creek Turnpike Company *et al.* v. Robbins *et al.*

and it was decided that the complaint was good, and that the court below had erred in sustaining a demurrer thereto. The case will be found reported in 34 Ind. 461.

The action was commenced on the 30th of October, 1869. On the 8th of December, 1868, the company applied to the board of commissioners for the appointment of assessors of benefits, etc., and such assessors were accordingly appointed, and they made their report to the auditor on the 16th of January, 1869. After the cause had gone back from this court, viz., at the May term, 1871, of the court below, the defendants moved to reject the complaint, because it was verified before a notary public, who was one of the plaintiffs' attorneys, and because it was not verified, as required by law, in this, that it was sworn to by one only of the plaintiffs. The motion was overruled, and the defendants excepted.

The defendants filed an answer, the second and third paragraphs of which set up new matter. Demurrers, for the want of sufficient facts were filed and sustained to the second and third paragraphs of the answer, and due exception taken. The general denial having been withdrawn, final judgment was rendered for the plaintiffs.

The questions arising upon the record relate to the ruling of the court in overruling the motion to set aside or reject the complaint on the ground stated, and to the ruling in sustaining the demurrers to the second and third paragraphs of the answer.

The complaint was sworn to by Robbins only, and not by the other plaintiffs who joined in the action. It is urged by counsel for the appellants that, inasmuch as the plaintiffs below were the several owners of the tracts of land in the complaint mentioned, on which several assessments had been made, although they might join in the action, yet the complaint should be verified by each of them. It seems to have been so held by the New York Superior Court. *Gray v. Kendall*, 5 Bosw. 665.

It is also urged that an oath administered to a party by his attorney in the cause in which the oath is administered,

is irregular, and that the proceeding should be set aside. This was so held by the Supreme Court of New York. *Gilmore v. Hempstead*, 4 How. Pr. 153. In the case last cited is a collection of English and New York authorities on the point.

We decide nothing upon either of these points, for the reason, that, in our opinion, the complaint, for the purpose of laying the foundation of a final judgment, was good without being verified at all.

The statute provides, that, "in all applications for an injunction, the complaint, or so much thereof as pertains to the acts or proceedings to be enjoined, shall be verified by affidavit. The injunction may be granted at the time of commencing the action, or at any time afterward, before judgment in that proceeding." 2 G. & H. 133, sec. 138. Taking this section of the statute in connection with the other provisions on the subject of injunctions, we think it clear that the verification is required only in cases where a restraining order or temporary injunction is sought before final judgment in the action, and that where the sole relief sought is to be had in the final judgment of the court, no verification is necessary. We see no good reason for requiring a verification where the remedy sought is the final judgment enjoining the act or acts complained of. If the defendant deny the facts, he puts the plaintiff upon the proof of them, before the court or jury, and such proof is not strengthened any by his previous verification of them. If the defendant admit the facts, expressly or by failing to controvert them, the admission is not strengthened by such verification.

But where an injunction is sought pending the action, the facts must be verified. Until the facts have been admitted, or found by the court or jury, they are not established; and until the facts are established or sworn to, an injunction should not be granted. But where the only relief sought is to be afforded by the final judgment of the court, inasmuch as such judgment cannot be rendered until the facts author-

The Sand Creek Turnpike Company *et al.* v. Robbins *et al.*

izing it have been established, either by admission or trial, and finding or verdict, there is no more reason that the complaint should be sworn to, than there is that all complaints should be sworn to.

If the complaint is not duly verified, it is, doubtless, good ground for refusing a restraining order or temporary injunction pending the action, and perhaps ground for setting it aside where it has been unadvisedly granted; but it is no ground for rejecting or setting aside a complaint which asks an injunction as the final relief prayed for. There was, therefore, no error in the ruling in this respect.

The second paragraph of the answer alleged matter by way of estoppel, similar to that pleaded in the case of *Hopkins v. The Greensburg, etc., Turnpike Co.*, 40 Ind. 44. No good purpose would be subserved by setting out the matter at large which is thus pleaded, as, in accordance with the case above cited, it does not constitute a valid estoppel. The demurrer to this paragraph was correctly sustained.

The third paragraph of the answer presents quite a different question. It is pleaded in bar of the action, except as to the costs which had then accrued therein; which means, we think, in bar of the further prosecution of the action. It alleges that the original assessment was made by the assessors as officers appointed by the board of commissioners, and not as agents or employees of the company, and that the company in no way connived at, consented to, or procured such assessors to omit to list, view, or assess any lands within the prescribed limits; that on the 9th of March, 1871, the board of commissioners, of its own motion, ordered the original assessors to proceed, on the 21st of March, 1871, to view, list, and assess all lands, if any, omitted in their former assessment report; that the assessors proceeded, on the day named, to view, list, etc., and on the 13th day of April, 1871, they made their report to the auditor. Copies of the order of the board to the assessors, and of the report of the assessors, are set out. The amended assessment thus made

purports to embrace all the lands within the prescribed limits not included in the former list and assessment. The board of commissioners ordered that the auditor make such additions to the tax duplicate as the report might render necessary. It is averred that the auditor has placed the corrected assessment on the duplicate, and that the parties so assessed by the amended assessment have paid or agreed to pay the amounts assessed to them; that by the subsequent assessment the omitted lands mentioned in the complaint were included, and thereby said assessment was so corrected and amended as to include a list of the lands within the prescribed limits, and that the assessors viewed all of such lands, and assessed the benefits, etc.

From this paragraph of the answer it sufficiently appears that, by the original assessment and the amendatory or supplemental one, all the lands within the prescribed limits have been listed and assessed. In determining the validity of the paragraph, several questions arise. One is, whether an amendment can be made at all. We are of opinion that it can. We see no good reason why it should not be done. Otherwise, the law would be, in a great measure, impracticable. If an amendment cannot be made, the casual omission in the list of some of the land within the prescribed distance from the road, would render it necessary to again go through the whole form of listing, viewing, and assessing the entire lands. This would be imposing an unnecessary burthen. If it is discovered that lands have been omitted in the list returned, we think the board of commissioners may, of their own motion, or at the instance of any one interested, re-assemble the assessors, and require the proper correction to be made, and that it may be made accordingly, as was done in this case.

When the amendment is thus made, so that all the lands liable to be listed and assessed are included, does the entire assessment become valid? We are of opinion that it does. Indeed, this conclusion is involved in the proposition that an amendment can be made. The lands, under the act of 1867

(Acts, 1867, p. 167), as well as under the act of 1869 (3 Ind. Stat. 538), are to be assessed for the full amount of benefit which they will receive from the construction of the road, without regard to the cost of the construction; but no more is to be collected than is necessary for the construction of the road and the payment of legitimate expenses. Thus the omission of some of the lands can make no difference whatever in the amount to be assessed upon the others. We must assume that the lands of the plaintiffs were assessed for the same amount precisely, as if all the lands had been originally listed and assessed. But as no more is to be collected on the assessment than is necessary for the construction of the road, etc., the plaintiffs are interested in having all the lands which are liable duly listed and assessed, because, if some are omitted, the percentage to be collected on those that are listed and assessed may be greater than if all the lands were included. This, we apprehend, is the substantial reason why the omission of some of the lands liable should be held to invalidate the assessment upon the others. But as the lands originally assessed are assessed for the same amount as if all the lands had been listed and assessed, and as the amendment of the assessment brings in the omitted lands, and subjects them to the burthen equally with those that were assessed originally, it results that the land owners occupy the same position as if all the lands liable had been included in the original list and assessment returned. The amendment being made, the entire assessment becomes as complete and perfect as if all the lands had been included in the original proceeding.

Can the amendment be made pending an action to enjoin the collection of assessments on the ground that part of the lands liable to the assessment had been omitted, so as to make such amendment available to defeat the further prosecution of such action? We are of opinion that this also may be done. We see no reason why such amendment may not be made as well pending such action as at any other time; and when made, if in time to make it available for

that purpose, we think it may be pleaded in bar of the further prosecution of such action. At the time this action was instituted some of the lands liable to assessment had been omitted, and this furnished good ground for the action. But at the time the answer was filed the lands had all been included, and the ground of the complaint completely removed. On the plainest principles of law, the amendment afforded a valid bar to the further prosecution of the action. It could not be pleaded in bar of the entire action, because up to the time when the amendment was made the plaintiffs had a good cause of action, though they ceased to have such cause when the amendment was made. But the defendants pleaded the matter only in bar of the further prosecution of the action; in other words, they pleaded it in bar of the action except as to the costs which had then accrued. This is equivalent to saying to the plaintiffs, "you had a good cause of action when you commenced this suit, and you are entitled to your costs herein, but you are not entitled to prosecute the action any further, for the reason that all the ground of your complaint has been removed."

This case differs from that of *Hardwick v. The Danville, etc., Gravel Road Co.*, 33 Ind. 321, where the amendment of the assessment seems to have been pleaded in bar of the entire action, and not of the further prosecution thereof.

But it is insisted by the appellees that inasmuch as the amendment of the assessment was made after the repeal of the act of 1867 by that of 1869, the proceeding was without authority and void. The section of the act of 1869 repealing the act of 1867 contains this proviso: "Provided, however, that all rights acquired, and all acts performed in pursuance of the provisions of the above mentioned act, are saved from the effect of this repealing clause, and all companies which have commenced proceedings under said act, may proceed according to the provisions of this act."

By the act of 1867, a company having a subscription of eight hundred dollars per mile of the proposed road was authorized to make an assessment upon lands, as therein

The Sand Creek Turnpike Company et al. v. Robbins et al.

provided for, while under the act of 1869 a subscription of at least three-fifths of the estimated cost of the construction of the road is made necessary before such assessment can be made. We have seen, however, that by the proviso above quoted, all rights acquired, and all acts performed, under the repealed act, are saved from the effect of the repeal, and that companies which had commenced proceedings under the repealed act are authorized to proceed according to the provisions of the act of 1869.

We are of opinion that when the corporation, the appellant herein, became duly organized, and obtained a subscription of the eight hundred dollars per mile of the proposed road, and applied to the board of commissioners for the appointment of assessors of benefits, and when such assessors were appointed, the company had acquired the right to have a full and complete list and assessment returned by such assessors, and to have the assessment put upon the duplicate and collected in the manner specified. All these things had been done before the repeal of the act of 1867, except the making and return of a full and complete list and assessment. This, we think, under the proviso quoted, might be done after the repeal of the act of 1867, inasmuch as the company acquired the right before that time to have it done, and was authorized to proceed under the act of 1869. Suppose, to illustrate, that previous to the repeal of the act of 1867, all the previous steps had been duly taken, assessors appointed, the land all duly listed, viewed, and assessed, the return made out and signed, but before the return was actually made to the auditor, the law was repealed, with the proviso quoted. It would seem to be clear that in such case the return could be made, and the assessment put upon the duplicate, and the necessary amount thereof collected. There is no material difference between the case supposed and that under consideration. The corporation had the right to have the assessment properly made on the state of facts that entitled her to it at the time the assessors were appointed to make it. She then had the necessary subscription, and could not, under

Headrick v. Wisehart.

the proviso, be required to have it increased to meet the requirements of the act of 1869.

We are of opinion, for the foregoing reasons, that the court erred in sustaining the demurrer to the third paragraph of the answer.

The judgment below is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

W. Cumback, S. A. Bonner, J. Gavin, and J. D. Miller,
for appellants.

C. Ewing, J. K. Ewing, J. S. Scobey, and O. B. Scobey,
for appellees.

HEADRICK v. WISEHART.

VENDOR AND PURCHASER.—Quitclaim Deed.—Parol Contract.—Where one conveys land by quitclaim deed, and agrees by parol to pay the taxes already charged against the land, and fails to make such payment, and his vendee thereupon pays the taxes, the vendor is not liable to an action for money paid for his use and at his request. OSBORN, J., was not prepared to say that the action might not be sustained, treating the promise to pay the taxes already due as part of the consideration for the purchase.

APPEAL from the Henry Common Pleas.

PETTIT, C. J.—The complaint is this: "Jackson Wisehart complains of John Headrick, defendant, and says that the defendant is indebted to him in the sum of four hundred and seventy-six dollars and sixty cents, for money paid to and for the use of said defendant and at his request, a bill of particulars of which is herewith filed; wherefore the plaintiff demands judgment for five hundred dollars.

"Bill of particulars: January 29th, 1870.

"Cash paid Joseph Pugh, treasurer of Madison
county, taxes on lots Nos. 12 and 13, city of
Anderson.....\$356.78

Headrick v. Wischart.

"Cash paid E. B. Carman, treasurer Anderson
 City, taxes on same..... \$119.88
 "Interest on same..... 23.34

\$500.00."

The answer was the general denial; trial by the court, finding for the plaintiff, motion for a new trial overruled, judgment on the finding for four hundred and ninety dollars and ninety-six cents.

The case made by the evidence is this:

Headrick traded to Wischart a house and two lots, named in the bill of particulars, in the city of Anderson, which he had bought at sheriff's sale, for Iowa lands. Wischart made Headrick a warranty deed for the Iowa lands, and Headrick made Wischart a quitclaim deed for the house and lots in Anderson City. Before, and at the exchange and delivery of the deeds, it was agreed by and between the parties by parol, that each should pay all back taxes for which the land conveyed by him was liable. The plaintiff swears that this was the agreement, while the defendant swears directly the reverse, that no such agreement was made; but the plaintiff is corroborated in his evidence, and the defendant is not, and we think the court was warranted in coming to the conclusion that such an agreement was made. It further appears, by the evidence, that, before suit was brought, the plaintiff demanded of the defendant that he should pay the taxes due on the house and lots, and that the defendant refused to do so, denying that he was in anywise bound to do so. The plaintiff did pay the taxes due on the Iowa lands, which he had conveyed by warranty deed to the defendant. It also appears that the plaintiff sold the house and lots in Anderson to a third person, and agreed to pay, or cause to be paid, all back taxes on them, and that the defendant refused to pay the taxes, and that the plaintiff did pay them, and relieved the property from the charge of taxes in the hands of his vendee. There is no pretence that there was in fact a request by the defendant to or on the plaintiff to pay this

money. Do the facts above shown, in law, constitute a paying of the money to and for the use of the defendant and at his request? Can a man who conveys land by quitclaim deed, and at the same time by parol agrees to pay back taxes, be bound by such contract? We answer the first question in the negative. A majority of the court think that the second question is not raised by the record, and decline to pass upon it, but I think it is presented in the case, and I hold that it would not only be a contradiction of a written contract made in the most solemn form of law, but it would be making an entirely different contract by parol from the written one. When a man makes a quitclaim deed, he says by it, I give all of my interest, and I do not and will not bind myself to do more.

Howe v. Walker, 4 Gray, 318, is a case in point. In that case the court say: "The question raised by these exceptions lies within a narrow compass. The defendant made a deed of quitclaim to the plaintiff, with a covenant to warrant and defend the quitclaimed premises against the lawful claims and demands of all persons claiming by or under him. There was an incumbrance on the premises, not created by the grantor, to wit, a mortgage of one thousand dollars, and the plaintiff avers, that at the time the defendant made this quitclaim and limited covenant by deed, he, at the same time, and for the same consideration, made a parol agreement to discharge and pay the mortgage. This action was brought to recover an amount paid by the plaintiff upon the mortgage, which he says the defendant by his parol agreement had promised to pay. The plaintiff offered evidence of such parol agreement, and it was excluded. It was, we think, rightly excluded. The parties made a contract in writing at one time, for one consideration, upon one subject-matter. Of that contract the written instrument is the exclusive evidence. The parol evidence, if admitted, would enlarge the covenant contained in the deed; it would show a covenant, not merely against incumbrances created by the grantor, to which the deed is restricted, but a covenant or

agreement to remove incumbrances created by a third person.

"It is true, as the plaintiff suggests, that the consideration of a contract, in other respects within the statute of frauds, may be proved by parol. You may prove what was the real consideration, and that it was not that recited in the deed. But you cannot show that, as the consideration of a deed from A. to B., of Whiteacre, B. agreed, by parol, to convey Blackacre to A.; and rely upon such parol agreement as the ground of a suit in equity to enforce a specific performance. That is, under the power of proving by parol the consideration of a written contract, you cannot establish an independent agreement, otherwise within the statute of frauds. Nor can you, under the guise of proving by parol the consideration of a written contract, add to or take from the other provisions of the written instrument. This would practically dispense with the statute of frauds, and with that sound rule of the common law, which finds in the written contract the exclusive and conclusive evidence of the intent and agreement of the parties, and will not suffer such written contract to be varied or affected by any contemporaneous parol agreement." *Oiler v. Gard*, 23 Ind. 212; *McClure v. Jeffrey*, 8 Ind. 79. I think this is sound reasoning, and conclusive in this case. The causes for a new trial were, "first, because the decision or finding of the court is contrary to law; second, because the said decision is not sustained by sufficient evidence; third, because the amount of the recovery is too high."

The assignments of error are, "first, the court erred in overruling appellant's motion for a new trial; second, the court erred in finding for the plaintiff below, when the finding should have been for the defendant."

The motion for a new trial and the assignment of errors are resolved into the question as to the sufficiency of the evidence to justify the finding and judgment. We hold that the evidence, in view of the law applicable to the case,

was not sufficient to warrant or sustain the finding and judgment, and that the court erred in refusing a new trial.

The judgment is reversed, at the costs of the appellee, with instructions to the court below to grant a new trial.

OSBORN, J.—I agree with the Chief Justice, that the judgment of the court below should be reversed. The evidence does not sustain the action for money paid for the use of the defendant below, at his request.

To maintain an action for money paid for the use of the defendant, it must appear that the plaintiff has paid money to a third party at the request, express or implied, of the defendant, and with an understanding, express or implied, on his part, to repay it. Chitty Contracts, 658.

In the case under consideration, the above requisites are wanting. The money was not paid for the use of the appellant. He was not personally liable for the taxes. His property was not liable to seizure therefor. He purchased the lots in May, and sold them to the appellee in July of the same year. He had no interest in the lots to protect after that. It was not paid at the request of the appellant. There is no pretence that an express request was shown by the evidence. On the contrary, when the appellant was asked by the appellee to make the payment, instead of asking the latter to do it, he put him off, and suggested that the lots had better be sold, so as to strengthen the title. Nor can it be implied. The breach of his contract with the appellee to pay the taxes cannot be construed into an implied request. Otherwise than by that contract, he was under no obligation to pay the taxes, and after the execution of his quitclaim deed to the appellee, he had no interest in doing it. Whatever interest he had in the lots was by that deed transferred to the appellee. There was no promise by the appellant to repay the money to the appellee.

I am not prepared to say that an action might not be sustained on a complaint stating the transaction detailed in the evidence, and predicated the action upon the contract to

Garner v. Gordon.

pay the taxes upon the lots as a part of the consideration for the Iowa lands.

I place the reversal solely upon the ground that the evidence does not sustain an action for money paid for the use of the appellant, and not on the ground that, to sustain it, the terms of the quitclaim deed must be varied by oral evidence. I do not think that question is properly before us, and hence decline to discuss or pass upon it.

J. Brown and R. L. Polk, for appellant.

M. L. Bundy and E. H. Bundy, for appellee.

GARNER v. GORDON.

HABEAS CORPUS.—*Change of Venue.*—*Trial by Jury.*—A proceeding by *habeas corpus* is not a civil action within the meaning of section 207 of the code, authorizing a change of venue; nor is it a civil case within the meaning of section 20 of the bill of rights, authorizing a trial by jury.

SAME.—*Evidence.*—*Wife.*—It is error to permit a petitioner in a writ of *habeas corpus* to testify to conversations had with the wife of the respondent, during his absence, there being no proof of agency. Nor can the wife testify to such conversations, she not being a party to the proceeding.

SAME.—*Petition by Mother.*—*Character.*—*Evidence.*—Where the petitioner claimed the custody of her two daughters, aged nine and eleven years, and the return alleged that she was an unsuitable person to be entrusted with the custody and moral and intellectual training of her infant daughters, and as evidence thereof it was charged that she was an unchaste and impure woman, and that her general character for chastity and virtue was bad in the neighborhood, the first allegation authorized proof of particular acts of unchastity, and under the second allegation her general reputation was involved, and the proof was not confined to two years, as provided in the divorce law; but having shown the character at the time of the trial, it was competent to show how long such reputation had been established.

SAME.—*Mother and Guardian.*—*Custody of Children.*—Where the question as to custody is between the mother of female children and their guardian, the wishes of the parties should be placed out of view and the best interests of the children considered. If the mother be impure in life and in her associations, and keep in her possession immoral and vile publications, and wander about from place to place with evil company, having no home for her children, she is not a suitable person to have the care of them.

41	98
130	238
41	98
139	272
41	98
148	385
41	98
157	8
41	98
165	338

Garner v. Gordon.

SAME.—Custody Pending Appeal.—It is error in a judge, after a finding in favor of the mother, and against the guardian, and after an appeal is prayed and bond given, to change the custody of the children from the guardian to the mother pending the appeal.

SAME.—Evidence.—Past Treatment.—Evidence was proper to inform the court how the children had been treated by the guardian and by those in whose custody he had placed them, and how they would likely be treated if the petitioner received the children in her charge.

APPEAL from the Floyd Common Pleas.

BUSKIRK, J.—Belle A. Gordon, the appellee, petitioned the judge of the Floyd Common Pleas Court, in vacation, for a writ of *habeas corpus* directed to Garner, the appellant, requiring him to bring before the judge, at chambers, Nellie A. Gordon, aged eleven years, and Mary E. Gordon, aged nine years, and show the cause of their detention.

The petition stated that the petitioner was lawfully married to Edwin Gordon, and that she had two children by him, who are now living, to wit, Nellie A. Gordon, aged eleven years, and Mary E. Gordon, aged nine years; that on the 8th day of August, 1863, her said husband departed this life, leaving said children in the care of the petitioner, as their mother; that she is now, and has been ever since the death of her said husband, a widow, and that she is entitled to the care and custody of her said children, as their mother, their father being dead, as above stated; but said children are detained and kept from her by one Lewis L. Garner, in the city of New Albany, Floyd county, State of Indiana, with whom said children are now living; and said Garner refuses to permit her to take or remove them from his house, or to even permit said children to go on the street with her; and when said petitioner had called at the house of said Garner to see her said children, she had been abused and ordered therefrom; that the said petitioner, with the means that said children have in their own right, and with what she can supply, is able and is perfectly willing to care for and support said children, and, therefore, claims the control of her said children, as of right; wherefore, etc.

A writ of *habeas corpus* was accordingly issued and made

Garner v. Gordon.

returnable on the 18th day of July, 1871, at nine o'clock A. M., before the judge, at the court-house, in the city of New Albany, Indiana. The writ was returned executed, with the children named in custody.

Upon the return of the writ, the appellant filed his written application, supported by affidavit, asking for a change of venue from the said judge, upon the following grounds, viz.: first, because, as he believes, the Honorable Patrick H. Jewett, the judge before whom said cause is pending, is and will be a material witness for him, said defendant, on the trial of said cause; and, second, because of the bias and prejudice of the said Honorable Patrick H. Jewett, the judge before whom said cause is pending, in favor of the plaintiff and against the defendant in said cause. The motion was overruled, and the appellant excepted.

The appellant filed his written motion to quash the writ of *habeas corpus* upon the ground of the insufficiency of the petition, in this, that it does not allege that the said children were restrained of their liberty, and because there is no averment of the cause or pretence of such restraint; which motion the court overruled, and the appellant excepted.

The appellant then filed his verified return to the writ of *habeas corpus*, which was as follows:

"The defendant, Lewis L. Garner, for return to the writ of *habeas corpus* herein issued, and to him directed, states on oath that he has and keeps the said Nellie A. Gordon and Mary E. Gordon, in said petition and writ mentioned, in his custody and possession, under the authority and by the directions of Alfred W. Bently, who is, and has been for three years, the guardian of their persons and estates, under the appointment of the said court of common pleas of Floyd county; who is a resident of the city of New Albany, in said county; and that, as such guardian, the said Alfred W. Bently, for the reasons hereinafter stated, is lawfully entitled to the custody of their persons, as against their mother, the plaintiff herein, who is now, and has been for more than a year last passed, a non-resident of the State

of Indiana, to wit, a resident of the State of Kentucky; that the said Edwin Gordon, the father of said infants named in the petition, died at Floyd county, Indiana, in which county his estate is now in process of settlement; that said Nellie A. and Mary E. have always resided in this State and county, and that all the funds belonging to them are in the State of Indiana, and the county of Floyd. He further avers that said guardian, Alfred W. Bently, is the real party in interest herein, and this defendant solely acts under his direction and for him; and he further avers that if the custody of said children should be given to the petitioner, she intends to take them out of the jurisdiction of this court to the State of Kentucky. And the said defendant says that since the death of their father, the said Nellie A. Gordon and Mary E. Gordon have been nursed, taken care of, and provided for by this defendant and his wife, and have lived with and been treated by this defendant and his wife as their own children; that for years past the plaintiff has continuously treated her said children with coldness and neglect; that she has provided no home for them, and has now no home of her own to take them to; that she has neglected and abandoned her said children, even in sickness, and has ever manifested but little, if any, affection for them; that for years past she has wandered around from place to place, apparently unmindful of her said children, or of what would or might become of them; that on more than one occasion she has threatened to take the lives of her said children; that the plaintiff is, and has for years past been, a bawd and immoral woman, and has had, and now has, a notoriously bad reputation for chastity and virtue; and, therefore, this defendant says that the plaintiff is not a suitable person to have the custody of the persons of the said children. And said children are now produced before the court.

"L. L. GARNER.

"And the defendant, answering further, excepts to the sufficiency of the complaint herein, for the reason that the same does not aver that said children are restrained of their lib-

Garner v. Gordon.

erty, and there is no averment in said complaint of the cause or pretence on the part of the defendant, Lewis L. Garner, for such restraint, as required by the statute in such cases made and provided.

LEWIS L. GARNER."

And thereupon the said petitioner filed her exceptions to the return as follows:

"First. The said Belle A. Gordon excepts to the sufficiency of that part of the return made by Lewis L. Garner to the writ of *habeas corpus* which alleges that said Garner has and keeps the said Nellie A. Gordon and Mary E. Gordon in his custody and possession under the authority and by the direction of one Alfred W. Bently, as appears and is alleged in the lines numbered from three to thirteen, inclusive, for the reason that said part of said return does not state facts sufficient to constitute a legal excuse for the detention of said Nellie A. and Mary E. Gordon from the said Belle A. Gordon by the said Lewis L. Garner.

"Second. And the said Belle A. Gordon excepts to as much of said return as alleges that the said Nellie A. Gordon and Mary E. Gordon have been nursed, taken care of, and provided for by the said Garner and his wife, and have been treated by them as their own children, as set forth in lines of said return from fourteen to eighteen, inclusive, for the reason that the matters stated in said part of said return do not contain a legal excuse for the detention of said Nellie A. and Mary E. Gordon from the said Belle A. Gordon by said Lewis L. Garner.

"Third. The said Belle A. Gordon excepts to the sufficiency of so much of said return as alleges that the said Belle A. Gordon has provided no home for them (the said Nellie A. and Mary E. Gordon), and that she has no home of her own to take them to, as set out in the lines of said return numbered from twenty to twenty-one, inclusive, for the reason that said part of said return does not state facts sufficient to constitute a legal excuse for the detention of the said Nellie A. and Mary E. Gordon from this petitioner.

"Fourth. The said Belle A. Gordon excepts to the suffi-

Garner v. Gordon.

ciency of so much of said return, 'that the said Belle A. has for years past wandered from place to place, apparently unmindful of her said children, or what might or would become of them,' set out in lines of said return numbered from twenty-four to twenty-seven, inclusive, for the reason that said part of said return does not state facts sufficient to constitute a legal excuse for the detention of said children from the petitioner.

"Fifth. The said Belle A. Gordon excepts to so much of the return of the said Lewis L. Garner to said writ as alleges that the said Belle A. Gordon 'has had and now has a notoriously bad character for chastity and virtue,' for the reason that said part of said return does not state facts sufficient to constitute a legal excuse for the detention and restraint of the said Nellie A. and Mary E. Gordon by said Garner.

"Sixth. The said Belle A. Gordon further excepts to the sufficiency of said return, because it does not appear therefrom that said Garner has the ability to maintain said children.

"Seventh. And said Belle A. Gordon excepts to so much of the return of said Garner to said writ as alleges 'that the petitioner is a resident of the State of Kentucky; that the father of said children resided in Floyd county, Indiana; that their estate is in said county of Floyd; that said Garner is acting under the direction of Alfred W. Bently; and that this petitioner intends to remove said children beyond the jurisdiction of this court;' as set out in lines of said return numbered from thirty-five to forty, inclusive, because said part of said return does not state facts sufficient to constitute a legal excuse for the restraint and detention of said children by said Garner.

"DAVIS & DOWLING, Att'ys for Pet'r."

The court overruled the first, fifth, and sixth exceptions, and sustained the second, third, fourth, and seventh exceptions; to which ruling of the court, in overruling

the first, fifth, and sixth exceptions, the appellee excepted; and to the ruling of the court in sustaining the second, third, fourth, and seventh exceptions, the appellant excepted.

And the said appellee replied in denial of the return of the said appellant.

And the cause being at issue, and being called for trial, the appellant demanded of the court that the same should be tried by a jury; which motion the court overruled, and the appellant excepted.

And thereupon the cause was submitted to the court for trial, and resulted in a finding for the petitioner, and that she was entitled to the custody of the said children.

"And thereupon the defendant, Garner, moved the court for a new trial, and time is given until to-morrow morning to file his reasons therefor. And it is ordered by the court, that during the pendency of these proceedings, and until the further order of the court herein, Nellie A. Gordon and Mary E. Gordon be placed in the custody of Sarah E. South, in the city of New Albany, Indiana; and the said Sarah E. South, in open court, accepts said appointment; and said Nellie A. Gordon and Mary E. Gordon were delivered to her."

And afterward, to wit, on the 22d day of July, 1871, the appellant filed in writing the following reasons for a new trial:

1. Because of irregularity in the proceedings and orders of the court, by which the said Garner was prevented from having a fair trial, in these particulars:

a. In that the court overruled said Garner's application for a change of venue, over his exception.

b. In that the court overruled said Garner's motion to quash the writ issued herein, for insufficiency of the petition, over said Garner's exception.

c. In that the court sustained said Gordon's exceptions numbered the second, third, fourth, and seventh, to the return of the said Garner to said writ.

d. In that the court overruled said Garner's demand for

a jury to try the issues in the above-entitled matter, over said Garner's exception.

2. In that the finding of the court is not sustained by sufficient evidence.

3. In that the finding of the court is contrary to the law.

4. Because of error of law occurring at the trial and duly excepted to at the proper time by this defendant, Garner, in these particulars, viz.:

a. In that the court permitted said Belle A. Gordon to testify to conversations between her and the wife of the said respondent Garner, on or about June 15th, 1871, at the said Garner's house, in the absence of the said Garner.

b. In that the court refused to permit the said Garner to prove by the testimony of James G. Shields, George Lyman, Lucien G. Mathews, Mrs. Sarah South, Mrs. Elizabeth Mann, all of them competent and duly sworn witnesses, that the general reputation of the said Belle A. Gordon, the petitioner herein, for virtue and chastity, in the community where she resided, had been bad from the year 1864 continuously until the commencement of this proceeding.

c. In that the court refused to permit the respondent, Garner, to prove by Alfred W. Bently, a competent and duly sworn witness, that the petitioner had provided no home for the children named in the petition, and has now no home of her own to take them to.

f. In that the court refused to permit the respondent Garner to prove, by the testimony of Alfred W. Bently, that the petitioner has not the ability and means to take care of said children.

g. In that the court permitted the petitioner to prove, by the testimony of said Bently, that he had agreed at one time to resign the guardianship of said children, in consideration of said petitioner's signing a deed for certain property.

h. In that the court refused to permit Lucinda Garner, wife of the said Lewis L. Garner, after she had been duly sworn in the cause, to testify upon any of the issues joined in said matter.

Garner v. Gordon.

i. In that the court erred in permitting the petitioner, after the evidence for the defendant had closed, to testify that she had never, at any time, had illicit intercourse with certain persons named.

j. In that the court ordered, during the pendency of said proceeding, and before the motion for a rehearing was filed, immediately after its finding, that the children named in said petition be committed to the custody of Mrs. Sarah E. South for a period of time longer than the progress of the proceedings herein, over respondent's exceptions.

The court overruled said motion, and the appellant excepted. The court thereupon rendered final judgment in favor of the petitioner on the finding, to which judgment the appellant at the time objected and excepted.

And thereupon the defendant Garner prayed an appeal to the Supreme Court, from the order and judgment of the court below, which was granted upon the filing of an appeal bond in the sum of one thousand dollars, conditioned according to law, with Lucien G. Mathews his surety, which bond was then filed and approved; and he also filed bills of exceptions, numbered from one to five inclusive, duly signed and sealed in open court, and fifteen days' time was given to file further bills of exceptions; and thereupon the defendant moved the court, in writing, to remand Nellie A. and Mary E. Gordon into his custody, and from the custody of the said Sarah E. South, to whom said children were committed by the court during the pendency of these proceedings and until the further order of the court, to remain in his custody during the period prescribed by law; which motion was overruled, and the appellant excepted.

The appellant has assigned a large number of errors, but all the questions arising in the record are included within five assignments of error, namely:

1. That the court erred in refusing to grant a change of venue.

2. That the court erred in not permitting the cause to be tried by a jury.

3. That the court erred in overruling the motion for a new trial.

4. That the court erred in rendering judgment on the finding of the court.

5. That the court erred in refusing to give to the appellant the custody of the children during the pendency of his appeal in this court.

All the other errors assigned are mere repetitions of the reasons for a new trial, and are embraced by the assignment that the court erred in overruling the motion for a new trial.

The first question presented for our decision is, was the appellant entitled to a change of venue? The solution of this question depends upon whether the proceeding by *habeas corpus* is a civil action within the meaning of section 207, 2 G. & H. 154. That section gives a right to a change "of venue of any civil action." It was held by this court, in *Baker v. Gordon*, 23 Ind. 204, that a proceeding by *habeas corpus* is not a civil case within the meaning of section 20 of the bill of rights, and that consequently such proceeding had to be tried by the court, and not by a jury. We are inclined to adhere to such ruling. We think it is equally clear that the proceeding under consideration is not a civil action within the meaning of the above section of the code, which gives the right to a change of venue. We are of the opinion that the court below committed no error in refusing to change the venue.

What we have said in reference to the change of venue applies to and disposes of the second assignment of error, which is based upon the refusal of the court to permit the cause to be tried by a jury. There was no error in such refusal.

Did the court err in overruling the motion for a new trial?

The first error which is alleged to have occurred on the trial is, that the court permitted the petitioner to testify to a conversation between her and the wife of the defendant, which

Garner v. Gordon.

occurred at the house of the defendant, when he was not present.

In this ruling the court erred. Mrs. Garner was not a party to the proceeding, and her declarations were no more binding upon her husband than those of an entire stranger. It was not shown that she was in any sense the agent of her husband.

It is next claimed that the court erred in refusing to permit Mrs. Garner, the wife of the defendant, to testify in reference to the conversation detailed by the petitioner. We do not think so. Neither a husband nor a wife is competent to testify for or against each other. This rule is subject to an exception, as where husband and wife are both parties, and the wife has a beneficial interest in the action, she may testify for herself although her testimony may benefit her husband, and the same exception applies to the husband. See *Bennifield v. Hypps*, 38 Ind. 498.

It is next insisted that the court erred in refusing to permit the defendant to prove by the testimony of James G. Shields, George Lyman, Lucien G. Mathews, Mrs. Sarah South, and Mrs. Elizabeth Mann, that the general reputation of Belle A. Gordon, the petitioner, for virtue and chastity, in the community where she resided, had been bad from the year 1864, continuously to the commencement of this proceeding, and in limiting the testimony of such witness as to her general character for two years prior to the commencement of such proceeding.

In our opinion the above ruling of the court was clearly erroneous. It was alleged in the return to the writ, that the petitioner was an unsuitable person to be intrusted with the custody and moral and intellectual training of her infant daughters, and as evidence thereof it was charged that she was an unchaste and impure woman, and that her general character for chastity and virtue was bad in the neighborhood where she resided. Under the first allegation, it would have been competent to prove particular acts showing her want of chastity and purity. Under the second allegation,

proof of particular acts was not admissible, but proof of her general reputation in reference to chastity and virtue, in the community where she resided, was alone competent. When proof of either good or bad general character is admissible, it is competent for the party seeking to establish character, after he has proved either a good or bad character at the time of the trial, to show how long such person has maintained such character.

We know of no law or practice that would confine such inquiry to two years before the time of the trial. It is provided by section sixteen of the divorce law, that "a petition for divorce may be filed by the wife in her own name, and it shall be deemed sufficient evidence of good character if such petitioner shall satisfy the court or jury trying the same, that she had for two years previous to the filing of such petition, maintained a good reputation for chastity and virtue." 2 G. & H. 352.

The above section has no application to any case or proceeding except for a divorce.

We refer to the following authorities as to proof of general character. *Hopps v. The People*, 31 Ill. 385; 3 Greenleaf Ev. 25; *Roscoe Crim. Ev.* 95.

We proceed to inquire whether the finding of the court is supported by the evidence. We do not deem it necessary to go into an examination of all the evidence. We shall only give the substance of the testimony bearing upon the fitness and suitableness of the respective parties to have the custody and control of the children. First, then, of the petitioner. She was adopted by the defendant when she was a mere child, and was raised and educated by him, with whom she lived, and by whom she was supported until her marriage. Her husband died in 1863, when she and her two children went to live with the defendant. The defendant and his wife had the almost entire control, care, and responsibility of the children. The petitioner gave her children but little care or attention. She frequently left them for weeks at a time, and on more than one occasion she left them when they were

Garner v. Gordon.

sick and needed a mother's care and love. It was shown that she had visited New York city, Cincinnati, Louisville, Gaines' Landing, New Orleans, Indianapolis, and Lafayette, either alone or accompanied by persons of bad reputation. It was proved by many witnesses that her general character for chastity and virtue was bad, and there was no evidence tending to show that her character was good. It was proved that she was in the habit of visiting a woman of infamous character in Louisville, and on one occasion she took her little girls with her, and remained some time at the house of such woman. It was proved that she kept in her bureau drawer books of an immoral, licentious, and lascivious character. We can do no more than give the titles of such books. They are as follows: "A Rational Guide, or Private Marriage Chart, for the use of all who wish to Prevent an Increase of Family;" "Errors in Courtship, and the Causes and Cures of Matrimonial Troubles;" "The Complete Master-Piece of Aristotle, the Famous Philosopher, displaying the Secrets of Nature in the Generation of Man, to which is added the Family Physician, being approved remedies for several distempers incident to the Human Body;" "The Loves of Byron, detailing his various Amours and Intrigues with the most Celebrated Women of his Time." The above books are made a part of the record.

It was also proved that she was at the time of the trial, and for some time previously had been, residing on a farm near Lexington, Kentucky, as the house-keeper of a married man, who resided in one house, while his wife resided in another house about a mile distant, and that the petitioner intended to remove her children to the place where she was residing.

It was shown that she had no house or home of her own, and that she had no means to support and educate her children.

On the other hand, it was shown that Mr. Bently was the guardian of the persons and estates of the children in question; that they possessed some estate, but just how much was not shown; that he had placed the children with Mr.

Garner v. Gordon.

Garner and his wife, who were upright, moral, and good people, and were devotedly attached to the children; that their physical wants were properly supplied, and their moral and intellectual training was faithfully attended to, by their guardian and the defendant and his wife; that all the estate of such children was in New Albany; and that the most of their relatives resided there.

The question is now presented for our decision, whether, upon the foregoing facts, the decision of the court below, awarding the custody of the children to the mother, was correct. The controversy is between the mother, the father being dead, and the guardian of the persons and estates of the infants.

The statute providing for the appointment of guardians for minor children contains the following provisions, namely: "Every guardian so appointed shall have the custody and tuition of such minor, and the management of such minor's estate during minority, unless sooner removed or discharged from such trust: Provided, that the father of such minor, or if there be no father, the mother, if suitable persons respectively, shall have the custody of the person, and the control of the education of such minor." 2 G. & H. 566, sec. 6.

It was said by this court, in speaking of the above section, in the case of *The State, ex rel. Sharpe, v. Banks*, 25 Ind. 495, that "the father is the natural guardian of his infant child, is responsible for its raising and education, and has the right to its custody. This is the well-settled rule, and the statute is simply declaratory of the right as it existed at common law. The law, however, has a tender regard for the interest of the infant, and in case it is made to appear that the father, by reason of his immoral and vicious habits and conduct, is rendered unfit to have the custody and training of his infant child, the court will refuse to award it to him, or will even direct it to be taken from him and placed where its moral training will be properly cared for."

Hurd on Habeas Corpus states the law thus: "The question of custody, between the conflicting claims of parents,

Garner v. Gordon.

being one of discretion rather than strict law, the duty of determining it is not only important in all cases, but in some exceedingly delicate and embarrassing. The welfare of the child is the object to be secured, and that requires attention to many circumstances; such as its sex, age, health and social position as affected by that of its parents; its just expectations of property from them or either of them or from others; and the state of its morals and education, and the surest means, under the circumstances, of securing for it that discipline and instruction necessary to qualify it for that station in life which the parents, had no controversy arisen, it may reasonably be supposed, would have desired and been able by their fortune or industry to prepare it to occupy." *Hurd Habeas Corpus*, 463.

In determining whether the finding of the court below was right, upon the evidence, we are mainly to lose sight of the wishes of the contending parties, and consult principally the welfare of the infants. They were, respectively, nine and eleven years of age when this cause was tried, and are females. They are just of that age when they are easily influenced, either for good or evil. Impressions made upon their minds and guileless hearts would have a lasting influence upon their future lives. The influence of the mother is justly and naturally very great over her children, and especially her daughters. Daughters naturally and instinctively look to their mother for counsel, advice, and direction. The mother teaches both by precept and example. If the mother is a pure, virtuous, and exemplary Christian woman, abides in her house and surrounds her children with the purifying and restraining influence of a happy and cheerful home, her influence for good is as lasting as time and eternity. If, on the other hand, the mother is impure, unchaste, immoral, and "her feet abide not in her house," but she wanders about from city to city, her influence for evil is great and lasting. The constant and earnest desire of a good woman is, by precept and example, to do good and make others happy and virtuous. Her purpose in life is to

alleviate suffering and elevate others to her own stand-point. But all history, experience, and observation demonstrate that an impure, immoral, and lascivious woman desires to degrade and debase others, and bring them down to her own position. There are many lamentable instances where even the love of a mother was not strong enough to prevent her from polluting the minds and corrupting the hearts of her own daughters. But even where an impure mother seeks by precept to keep her daughters pure and good, her evil example exerts a baneful influence upon them. Young girls should never be without the healthy and restraining influence of a cheerful and happy home, and should be guarded and protected from the evil example and baneful influence of an impure and lascivious woman and such associates as she would surround herself with. In our opinion, no mother who would keep in her possession such indecent, lewd, and lascivious books as the petitioner did, should be entrusted with the moral and intellectual training of young girls.

It has been wisely provided by the legislature, that the father, or if there be no father, the mother, if suitable persons, shall have the custody of the person, and the control of the education of their minor children, in preference to the guardian of their estates. But it is only where the father or mother is a "suitable person" that such preference is given. It is expressly provided, that "every guardian so appointed shall have the custody and tuition of such minor." When it is shown that the father or mother is, by reason of "mental, moral, or physical disqualifications," an unfit or unsuitable person to be intrusted with the custody of the person and tuition of his or her children, then the guardian is entitled to such custody and control.

It is very plain and obvious to us that the petitioner, in the case in judgment, is wholly unsuited and unfit to have the custody and control of her infant daughters. It is a delicate and painful thing to separate a mother from her infant daughters. We have the highest respect for the deep

Garner v. Gordon.

and holy love of a mother, and unless restrained by a high and imperative sense of duty to secure the welfare and happiness of infants, we should be strongly inclined to recognize the right of the mother. We entertain no doubt as to our duty in this case. It is not the fault of the law that a mother and her daughters are separated, but it is solely and exclusively the fault of the mother, who, by her immoral and lascivious conduct, has rendered herself an unfit associate and instructor of her pure and guileless daughters.

In our opinion, the finding and judgment of the court below were contrary to the law and the evidence.

The last error assigned presents for our decision the question whether the court erred in refusing to give to the defendant the custody of the infants during the pendency of the appeal in this court.

It was held by this court, in *The State, ex rel. Sharpe, v. Banks, supra*, that an appeal would lie from a final judgment rendered upon a writ of *habeas corpus*, as in other cases under sections 555 and 556 of the code.

In the case under consideration an appeal was prayed and granted, and a bond was filed, and approved by the court. Upon the filing and approval of the bond, execution and all other proceedings on the judgment in the court below were stayed, and the court should have left the children in the custody of the guardian until the decision of this court. See sec. 555 of the code, 2 G. & H. 271.

The petitioner filed seven exceptions to the sufficiency of the return to the writ. The court sustained the second, third, fourth, and seventh exceptions. As the cause will go back for a new trial, it is necessary that we should pass upon such ruling. We have already set out in this opinion the exceptions, and do not think it necessary to restate them or their substance.

In our opinion, the court erred in sustaining such exceptions, and in excluding the evidence offered to support them. We do not think that any one, or, probably, all of them, constituted a sufficient answer to the writ, but all the

Sayre *et al.* v. McEwen.

allegations had a bearing upon the case, and should have been duly considered and weighed by the court. As we have seen, it was more a question of discretion than of strict law. The welfare of the infants was to be more considered than the strict legal rights of the parties. It was surely proper for the court to know how the infants had been treated by the defendant and his wife, and how they were likely to be treated and cared for by the petitioner, if their custody was awarded to her.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to grant a new trial, and for further proceedings in accordance with this opinion.

A. B. Carlton and J. H. Stotsenburgh, for appellant.

SAYRE ET AL. v. McEWEN.

PROMISSORY NOTE.—Assignee.—Vendor's Lien.—Non-Resident.—The assignee of a promissory note given to the assignor for purchase-money of real estate, and for the payment of which a vendor's lien exists, which is transferred to the assignee by the transfer of the note, and of which lien the assignee has full knowledge, is not bound to resort to the enforcement of the vendor's lien, before he can maintain suit against the assignor, the maker being a non-resident.

SAME.—Attachment.—Non-Resident.—An assignee of a promissory note, it was *held*, was not bound, before bringing suit against an indorser, to proceed by attachment against the property of the maker of the note, who was a non-resident at the time of the making and at the time of maturity of the note, although such assignee knew that the maker had property in this State subject to attachment.

APPEAL from the Bartholomew Common Pleas.

PETTIT, C. J.—The appellee brought this suit against the appellants, and the complaint was in three paragraphs, as follows:

“First. William McEwen complains of Thomas C. Sayre,

Sayre et al. v. McEwen.

Thomas Gent, and Benjamin F. Jones, and says that on the — day of —, 18—, the plaintiff and the defendant Benjamin F. Jones were carrying on a banking business at the city of Columbus, Indiana, by the name of McEwen & Jones, when said defendants Sayre and Gent produced to them a certain note, executed by J. H. Colston & Co. to Thomas C. Sayre, for the sum of five hundred dollars, dated March 8th, 1866, and payable twelve months after date, with interest from date, and then and there said Sayre and Gent sold said note to said McEwen & Jones for value, and endorsed said note on the back thereof; a copy of note and endorsement are made part hereof; that at the time of said purchase, the said makers of said note resided at Louisville, in the State of Kentucky, and on the 18th day of October, 1867, said McEwen & Jones instituted an action in the Jefferson Court of Common Pleas, in said State of Kentucky, on said note, and on the 18th day of November, 1867, recovered judgment thereon against said makers, and on the 26th day of November, 1867, execution was issued therefor on said judgment, and placed in the hands of the sheriff of said county, who returned thereon "no property found;" a copy of said judgment, execution, and return of sheriff is made a part hereof; but said makers of said note were totally insolvent at the time said note became due, and have been continuously since wholly and notoriously insolvent; said indebtedness is yet due and wholly unpaid, and said Jones is made a party hereunto to answer to his interest thereon.

"Second. The plaintiff further says that on the — day of —, 186—, the defendants Sayre and Gent produced a note to plaintiff and one Benjamin F. Jones, who were then doing a banking business at Columbus, Indiana, signed and executed by J. H. Colston & Co., dated March 8th, 1866, for five hundred dollars, and payable to Thomas C. Sayre twelve months after date, and then and there sold said note to them, and indorsed said note to them; a copy of note and indorsements are filed herewith; that at the time said note was sold to plaintiff, said Walker, one of

the makers of said note, was a resident of the State of Indiana, and carried on business at said county, and thereafter became a resident of the State of Kentucky, and when it became due, both of said makers were non-residents of said State of Indiana, and were residing in Kentucky; the said note is due and unpaid, and said indorsers have failed to pay the same, although requested; that plaintiff is now the owner of said indebtedness; and said Jones is made a party to answer to his interest therein.

"Third. Plaintiff further says, that on the — day of —, 18—, the plaintiff and the defendant Benjamin F. Jones were carrying on a banking business at the city of Columbus, Indiana, by the name of McEwen & Jones, when said defendants Sayre and Gent produced to them a certain note, executed by J. H. Colston & Co. to Thomas C. Sayre, for the sum of five hundred dollars, dated March 8th, 1866, payable eighteen months after date, with interest from date, and then and there said Sayre and Gent sold said note to said McEwen & Jones for value, and indorsed said note on the back thereof; copy of note and indorsement made part hereof; that at the time of said purchase, the said makers of said note resided at the city of Louisville, in the State of Kentucky, and on the 18th day of October, 1866, said McEwen & Jones instituted an action in the Jefferson Court of Common Pleas, in said State of Kentucky, on said note, and on the 16th day of November, 1867, recovered judgment thereon against said makers, and on the 26th day of November, 1867, execution was issued therefor on said judgment, and placed in the hands of the sheriff of said Jefferson county, who returned thereon 'no property found;' a copy of said judgment, execution, and return of sheriff is made part hereof; said indebtedness is yet due and unpaid, and plaintiff avers that he is now the owner of said indebtedness; and Benjamin F. Jones is made a party to answer to his interest therein. Wherefore plaintiff demands judgment for fifteen hundred dollars."

The answer was in five paragraphs, as follows:

"First. They deny each and every material allegation of said complaint.

"Second. For second and further answer herein, as to said first note, said defendants say that said note was given for part of the purchase-money of a certain steam flouring mill, and the real estate upon which the same was situated, in the town of Waynesville, Bartholomew county, Indiana, of the value of, to wit, six thousand dollars, and which, on the day of the date of said note, the defendant Sayre had sold and conveyed to said J. H. Colston & Co., and said Sayre expressly reserved in the deed of conveyance of said mill to said J. H. Colston & Co., his vendor's lien upon the same, to secure the payment of the said note sued on, and said lien, at the date of the assignment of said note to McEwen & Jones, was in full force and effect, and unsatisfied, and still is in full force and unsatisfied; all of said facts were communicated to McEwen & Jones at the time of assignment, and said McEwen & Jones had full knowledge at the date of the assignment and maturity of said note of said lien to secure the payment thereof, and also knew at the time of assignment that the makers both resided in the State of Kentucky, and were so informed at the time of assignment, but negligently failed and refused to take any steps to enforce the same; and said mill, long after the maturity of said first note, to wit, on the — day of September, 1868, was accidentally destroyed by fire, whereby the security of said mill and of said vendor's lien was entirely lost to defendants, the real estate upon which the same was situate being insufficient to pay said note.

"Third. For third and further answer herein, as to said first note, defendants say, that at the date of the maturity of said note, and long after, Samuel C. Walker, one of the members of the firm of J. H. Colston & Co., the makers of said note, was the owner in fee simple, in his own name, of the undivided half of a certain steam flour mill, and the real estate on which the same was situate, in the town of Waynesville, Bartholomew county, Indiana, of the value of six

thousand dollars, and more than sufficient to pay both of said notes, which said McEwen & Jones well knew, and were so informed at the time of the assignment by defendants to plaintiff, and that said plaintiff and said Jones wholly failed and neglected to take any steps to subject the same to the payment of said note; and thereafter, after the maturity of said first note, said mill was destroyed by fire, but the land yet remained the property of said Walker, and is sufficient to pay a large part of the said notes, to wit, three hundred dollars, and he owned no personal property in said State of Indiana.

"Fourth. For further and fourth paragraph of answer herein, as to said second note, defendants say the same was given for part of the purchase-money of a certain steam flour mill, and the real estate upon which the same is situate, in the town of Waynesville, Bartholomew county Ind., of the value of six thousand dollars, lately before the date of said note sold and conveyed by defendant Sayre to said J. H. Colston & Co.; and said Sayre expressly reserved in the deed of conveyance for said mill, which was duly recorded, his vendor's lien to secure the payment of said note; all of which McEwen & Jones well knew at the date of assignment, and at the maturity of said note; which said lien at the date of said assignment, and at the maturity of said note, was, and still is, wholly unsatisfied and in full force. Defendants say that shortly before the maturity of said note, said mill was destroyed by fire, but that the boilers, engines, and other machinery thereof, were, at the maturity of said note, remaining upon the ground where said mill had formerly stood, and together with said real estate were sufficient in value to pay the whole or a large part of said note, if steps had been taken to enforce said lien. But defendants say that said McEwen & Jones wholly failed, neglected, and refused to take any steps whatever, to enforce said lien upon said property, whereby the same became lost to defendants.

Sayre et al. v. McEwen.

"Fifth. For further and fifth paragraph of answer to said second note, defendants say Samuel C. Walker, one of the makers thereof, at the maturity thereof, was and still is the owner in fee simple in his own right of the undivided one-half of a certain mill site in the town of Waynesville, Bartholomew county, Indiana, and of a certain boiler, engine, and mill machinery situate thereon, of sufficient value to pay the said note or a large part thereof, which said McEwen & Jones well knew, but said McEwen & Jones wholly failed, neglected, and refused to take any steps to subject the same to the payment of said note, and the same is still subject to execution in the county of Bartholomew, State of Indiana; wherefore plaintiff ought to take nothing by his said suit, and defendants demand judgment and other proper relief."

The second, third, fourth, and fifth paragraphs of the answer were demurred to for want of sufficient facts, and the demurrer to each paragraph was sustained, and exception taken; and this ruling is assigned for error.

During the progress of the case, many points were raised, ruled upon, and exceptions taken, and many errors are assigned, but they are all expressly waived by the brief of the appellants, except, first, the sufficiency of the evidence to justify the finding and judgment of the court; second, the sustaining of the demurrers to the second, third, fourth, and fifth paragraphs of the answer. As to the first point, we have read and examined the evidence, which is all in the record, and it not only fully warrants, but requires, the finding and judgment of the court on the issue formed, which was by the general denial only.

As to the second, third, fourth, and fifth paragraphs of the answer, to which demurrers, for want of sufficient facts, were sustained, exceptions taken, and these rulings assigned for error, we have to say, they present two questions; first, is the assignee of a note given to the assignor for real estate, and for the payment of which a vendor's lien exists, which carries to the assignee, by assignment, the vendor's lien, and of

which the assignee had full notice, bound to resort to the vendor's lien before he can maintain suit against the assignor, the maker being a non-resident of the State at the making and maturity of the note?

Second. Is the assignee bound to proceed by attachment, when the maker was a non-resident of the State at the making and maturity of the note, against his property, when the assignee knows that the maker has property subject to attachment in this State, before he can maintain a suit against the endorser?

Following the line of the decisions of this court, and the provisions of our statute law in regard to the rights and duties of assignees, and the liabilities of assignors of promissory notes, and judgments against non-resident defendants, we must and do answer both the questions in the negative. See 2 G. & H. 658, sec. 4; same, p. 253, sec. 487; same, p. 66, sec. 43.

In holding, as we do, that it would be unreasonable to require the assignee to resort to the vendor's lien, or to an attachment, and thereby require him to give bond, on which he may be liable for many years, and to subject him to the delay, vexation, hazard, and responsibility which would or might attach to him in either case, we think we are sustained by the following cases in this court: *Cheek v. Morton*, 2 Ind. 321; *Hubler v. Taylor*, 20 Ind. 446; *Bernitz v. Stratford*, 22 Ind. 320; *Sims v. Parks*, 32 Ind. 363. As to the Kentucky authorities, the Supreme Court of the United States, in *Bank of the United States v. Tyler*, 4 Pet. 366, says: "The statute authorizing the assignment of notes is silent as to the duties of the assignee, or the nature of the contract created by the assignment. It only declares such assignment valid, and the assignee capable of suing in his own name: but the courts of that State have clearly defined the rights, duties, and obligations resulting from the assignment."

The Kentucky statute and ours are unlike, as will be seen by a reference to ours above cited.

And again, in the same case, that court says: "It is be-

The Franklin Life Insurance Company v. Hazzard.

lieved that the principles which exact such an unusual degree of vigilance from the assignee, are peculiar to the jurisprudence of Kentucky; but they have been established by a long series of cases adjudged in their highest courts for many years; they have long formed the law of that state as to notes and bonds assigned under their statute; and the legislature has not thought proper to change it. The courts in Virginia have given a very different construction to their statute on the same subject; and there are no decisions in any state which have extended the rule of diligence so far. But this court has always felt itself bound to respect local laws, however peculiar, in all cases where they do not come in collision with laws of higher authority and more imposing obligation. Such a case is not presented in the record now under our consideration. These are the duties imposed by the law of Kentucky on the assignees of promissory notes, before they can commence a suit against the assignor on his promise. These rules are the law of this case; and although in our opinion they carry the doctrines of diligence to an extent unknown to the principles of the common law, or the law of other states, where bonds, notes, and bills are assignable, we must adopt them as the guide to our judgment."

The court below committed no error in sustaining the demurrers to the second, third, fourth, and fifth paragraphs of the answer.

The judgment is affirmed, at the costs of the appellants.

J. N. Kerr and *F. Winter*, for appellants.

F. T. Hord, for appellee.

THE FRANKLIN LIFE INSURANCE COMPANY v. HAZZARD.

LIFE INSURANCE.—*Insurable Interest*.—*Assignment to one not Having Interest*.

A person cannot purchase and hold for his own benefit, as a matter of

41	116
150	247
41	118
150	646
150	647
159	648

The Franklin Life Insurance Company v. Hazzard.

mere speculation, a policy of insurance on the life of one in whose life he has no sort of insurable interest.

Although a policy be issued to one who holds an insurable interest in the life, and be therefore valid in its inception, its assignment to one holding no such interest will not sustain an action in favor of the assignee upon the death of the person whose life is insured.

APPEAL from the Franklin Circuit Court.

WORDEN, J.—This was an action by the appellee against the appellant on a life insurance policy, issued by the appellant to one William S. Cone, and by Cone assigned to the appellee.

Issue, trial, finding, and judgment for the plaintiff below, a motion for a new trial having been made by the defendant and overruled, and exception having been duly taken.

The policy was issued September 2d, 1867, and stipulates for the payment of the sum of three thousand dollars by the company to the assured, his executors, administrators, and assigns, within ninety days after due notice and proof of interest and of the death of said Cone, deducting therefrom all indebtedness of the party to the company. The premium paid down was sixty-two dollars and forty cents, and a like premium was to be paid by the assured annually on the 2d of September, during the life of Cone. By the terms of the policy, if the first premium to become due after the issuing thereof should not be paid at the time specified, the policy was to be forfeited, and the policy was not to be assigned without the consent of the company.

The material facts on which we place the decision of the cause, are these: On the 2d of September, 1868, the premium then falling due was not paid. Cone afterward said to the agent of the company that he had concluded not to keep up the policy, and he declined to pay the premium. Finally he sold the policy to the appellee, Hazzard, and on the 17th of September, 1868, duly assigned the same to him, and the assignment was assented to by the secretary of the company, subject to the conditions of the policy. Hazzard was not the creditor of Cone, nor had he otherwise any insurable interest in his life, but he simply purchased the pol-

The Franklin Life Insurance Company v. Hazzard.

icy, and paid therefor the sum of twenty dollars. On the policy's being assigned to Hazzard, he arranged with the company for the premium due on the 2d of September, 1868, by paying a part thereof in money and giving a note for the residue, which, we infer, was afterward paid. Cone died in July, 1869.

Can the appellee, on these facts, maintain the action?

We place no stress on the fact that the premium was not paid at the time it fell due, because the forfeiture of the policy seems to have been waived by the subsequent receipt, by the agents of the company, of the premium.

But the question arises whether a person can purchase and hold for his own benefit, and as a matter of mere speculation, a policy of insurance on the life of one in whose life he has no sort of insurable interest. This question is one of first impression in Indiana, and the authorities elsewhere are somewhat in conflict upon the point. We therefore feel at liberty to decide it in conformity with what seem to us to be the general principles of law applicable to the question. There can be no doubt that a policy issued to Hazzard upon the life of Cone, the former having, as in this case, no insurable interest in the life of the latter, would be absolutely void. We quote the following passage from the opinion of the court, as delivered by Judge Selden, in the case of *Ruse v. The Mutual Benefit Life Insurance Company*, 23 N. Y. 516: "Our inquiry, therefore, is, whether at common law, independent of any statute, it is essential to the validity of a policy, obtained by one person for his own benefit upon the life of another, that the party obtaining the policy should have an interest in the life insured. A policy, obtained by a party who has no interest in the subject of insurance, is a mere wager policy. Wagers in general, that is, innocent wagers, are, at common law, valid; but wagers involving any immorality or crime, or in conflict with any principle of public policy, are void. To which of these classes, then, does a wagering policy of insurance belong? Aside from authority, this question would seem to me of easy solution. Such policies, if



valid, not only afford facilities for a demoralizing system of gaming, but furnish strong temptations to the party interested to bring about, if possible, the event insured against."

There are many authorities establishing that such policies are void, as contravening public policy, but it is unnecessary to make further reference to them. Now, if a man may not take a policy directly from the insurance company, upon the life of another in whose life he has no insurable interest, upon what principle can he purchase such policy from another? If he purchase a policy as a mere speculation, on the life of another in whose life he has no insurable interest, the door is open to the same "demoralizing system of gaming," and the same temptation is held out to the purchaser of the policy to bring about the event insured against, equally as if the policy had been issued directly to him by the underwriter. We are aware that the doctrine is held in New York, that if the policy is valid in its inception, it may be assigned to any one, whether he have any interest in the life of the assured or not. *St. John v. The American Mutual Life Insurance Company*, 13 N. Y. 31; *Valton v. The National Loan Fund Life Assurance Company*, 20 N. Y. 32. Such, also, seems to have been the view taken by the Vice-Chancellor in the case of *Ashley v. Ashley*, 3 Sim. 149. But the contrary doctrine is maintained in Massachusetts. *Stevens v. Warren*, 101 Mass. 564. The following passages, from the opinion of the court in the latter case, will show the scope and effect of the decision:

"The plaintiff, as administrator of Barton, holds the proceeds of a policy of insurance upon the life of his intestate. The fund is assets in his hands for the benefit of one of the defendants as next of kin, after payment of debts, unless the other defendant is entitled to receive it by virtue of an assignment of the policy in the lifetime of the assured. * * * The only question to be determined in regard to the rights of the parties is, whether an assignment of the policy, by the assured in his lifetime, without the assent of the insurance company, conveyed any right, in law or in equity, to the pro-

The Franklin Life Insurance Company *v.* Hazzard.

ceeds when due. The court are all of the opinion that it did not. In the first place, it is contrary to the express terms of the policy itself, by which it is provided and declared that any such assignment shall be void. In the second place, it is contrary to the general policy of the law respecting insurance; in that it may lead to gambling or speculating contracts upon the chances of human life. The general rule, recognized by the courts, has been, that no one can have an insurance upon the life of another, unless he has an interest in the continuance of that life. Dewey K. Warren" (the assignee of the policy) "had no such interest, and could not legally have procured insurance upon the life of Barton. We understand the answer to deny that the policy was held by Warren as creditor and for his security; and to assert an absolute right by purchase. The rule of law against gambling policies would be completely evaded, if the court were to give to such transfers the effect of equitable assignments, to be sustained and enforced against the representatives of the assured. When the contract between the assured and the insurer is 'expressed to be for the benefit of' another, or is made payable to another than the representatives of the assured, it may be sustained accordingly. Gen. Sts. c. 58, sec. 62. * * * The same would probably be held in case of an assignment with the assent of the insurers. But if the assignee has no interest in the life of the subject of insurance which would sustain a policy to himself, the assignment would take effect only as a designation, by mutual agreement of the contracting parties, of the person who should be entitled to receive the proceeds, when due, instead of the personal representatives of the assured. And if it should appear that the arrangement was a cover for a speculating risk, contravening the general policy of the law, it would not be sustained." The decision in the above case is made to rest quite as much upon the second as the first ground stated, viz., that an assignment of a policy of life insurance to one having no interest in the life of the assured, where the assignment is a cover for a speculating risk, is



void, as contrary to the general policy of the law respecting insurance.

After pretty mature consideration, we have concluded that the doctrine announced in the case cited from Massachusetts is the true doctrine on the subject. All the objections that exist against the issuing of a policy to one upon the life of another in whose life the former has no insurable interest, seem to us to exist against his holding such policy by mere purchase and assignment from another. In either case, the holder of such policy is interested in the death, rather than the life, of the party assured. The law ought to be, and we think it clearly is, opposed to such speculations in human life. In our opinion, no one should hold a policy upon the life of another in whose life he had no insurable interest at the time he acquired the policy, whether the policy be issued to him directly from the insurer, or whether he acquired the policy by purchase and assignment from another. In either case he is subject, in the language of Judge Selden, above quoted, to strong temptations to bring about the event insured against.

In this case there was but a simple purchase of the policy by Hazzard. He had no interest whatever in the life of the assured. He was a mere speculator upon the probabilities of human life. His contract of purchase was essentially a wager upon the life of Cone, and his interests lay in the payment of few or no intermediate annual premiums, and the early happening of the event which was to entitle him to the three thousand dollars. By his purchase he became interested in the early death of the assured. We are of opinion that the law will not uphold such purchase, and that the appellee acquired no right to the policy or to the sum secured thereby.

Life assurance policies are assignable, to be sure, but in our opinion they are not assignable to one who buys them merely as matter of speculation without interest in the life of the assured. What is such an interest in the life of another as will authorize one to insure his life, or purchase a

 Skillen v. Skillen, Jr.

policy upon his life, is a question not involved in the case, and we express no opinion upon it.

It has been suggested by the counsel for the appellee that our statute providing for the assignment of contracts embraces contracts of this description as well as others. This may be, but we do not think the statute contemplates the valid assignment of a contract to a party who, under the circumstances, in view of the general principles of law, is incapable of being an assignee of the contract.

In our opinion, the plaintiff below was not, on the facts shown, entitled to recover, and the motion for a new trial should have prevailed.

The judgment below is reversed, with costs, and the cause remanded, for further proceedings not inconsistent with this opinion.

U. F. Hammond and F. M. Judah, for appellant.

W. Morrow and N. Trusler, for appellee.

41	123
140	370
140	437
141	558
41	123
149	689

 SKILLEN v. SKILLEN, Jr.

BILL OF EXCEPTIONS.—*Motion for New Trial.*—A statement in a motion for a new trial, that the court refused to permit a witness to testify as to certain facts, cannot be taken as true by the Supreme Court, unless sustained by a proper bill of exceptions.

APPEAL from the Marion Superior Court.

OSBORN, J.—The appellee sued the appellant, to recover the amount of a promissory note executed by the latter to the former. Issues of fact were formed, a jury trial was had, resulting in a verdict for the appellee for five thousand one hundred and thirty-four dollars. A motion for a new trial was filed, in which various causes are assigned why a new trial should be granted; that the verdict was contrary to evi-

Skillen v. Skillen, Jr.

dence; that errors of law occurred on the trial, to which exceptions were taken at the proper time, and the errors complained of are pointed out and stated in the motion. The motion was overruled, and final judgment rendered on the verdict, on the 19th day of June, 1871. Thirty days were given the appellee within which to file a bill of exceptions.

An appeal was taken to the general term of the superior court, and the judgment at the special term was affirmed. The appellant excepted, and ten days were given him to file a bill of exceptions.

The error assigned in this court is the refusal of the court to reverse, and in affirming, the judgment of the special term.

The only point made by the appellant is as to the competency of a witness. It is said in the brief that the appellant offered himself as a witness to prove certain facts material to the issue, and that the court erroneously refused to permit him to testify as to those facts. That is set forth in the motion as one of the errors occurring during the trial. There is nothing in the record showing that any evidence was offered, or instructions given, in the case, except as it is stated in the motion for a new trial. No bill of exceptions was filed, and the statements contained in the motion cannot be taken as true unless sustained by a proper bill of exceptions. *The Indianapolis Piano Manufacturing Co. v. First National Bank of Indianapolis*, 33 Ind. 302; *McSheely v. Bentley*, 31 Ind. 235.

The appellant informs us, in his brief, that the same point is presented in another case pending in this court, "the mate to this case, and decided with it below, and to be decided with it here." That was the case of this appellant against William M. Skillen, affirmed at the present term, *post*, p. 260.

The judgment of the said superior court of Marion county is affirmed, with costs.

S. E. Perkins and *S. E. Perkins, Jr.*, for appellant.

F. M. Finch and *J. A. Finch*, for appellee.

WEBSTER v. MAIDEN.

PRACTICE.—Relief from Judgment.—Fraud.—Newly-Discovered Evidence.—*Ex parte* Affidavits.—There are three proceedings which may partially involve the facts in the case, to which a party may resort after judgment has been rendered against him in the same court.

First. Any one who is a party to a judgment, or the heirs, devisees, or personal representatives of a deceased party, may file, in the court where such judgment was rendered, a complaint for a review of the proceedings and judgment at any time within three years next after the rendition thereof. Any one under legal disabilities may file such complaint at any time within three years after the disability is removed. A divorce is excepted from this provision. The complaint may be filed for any error of law appearing in the proceedings and judgment, or for material new matter discovered since the rendition thereof, or for both causes, without leave of court. In this proceeding the parties have the right to form issues of law and fact, and try these issues, as in other cases. "New matter" means something more than newly-discovered evidence, which alone will not sustain a complaint to review a judgment.

Second. Another method of relief from a judgment, and more frequently resorted to, is an application for a new trial. This is usually made during the term at which judgment is taken. Where, however, the cause is discovered subsequent to that term, a complaint may be filed, not later than the second term after the discovery, on which a summons issues for the next term, and the case is decided summarily on the evidence, but the application must be made within one year after final judgment.

Third. Section 99 of the code provides, that the court shall relieve a party from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, within two years. Where issues of fact have been formed and tried by a jury, and there has been a finding for the plaintiff, and a motion for a new trial has been overruled, and final judgment has been rendered, which on appeal to the Supreme Court is affirmed, the 99th section does not authorize the court to set aside the judgment upon *ex parte* affidavits of the discovery of new evidence relating to the issues which were disposed of in the former trial. The section was not intended to authorize relief from a judgment based upon a verdict which was the result of a trial in a case where issues had been formed, and both parties appeared, and the only ground for relief is newly-discovered evidence relating to the issues which were so tried. It applies to cases where, through the mistake, inadvertence, surprise, or excusable neglect of the party, the merits of the case have not been put in issue, tried, and decided. If it be admitted that courts in this country have the equity power recognized in English jurisprudence to give relief from a judgment obtained by fraud, still this cannot be done upon a mere *ex parte* showing.

APPEAL from the Montgomery Common Pleas.

DOWNEY, J.—The appellant sued the appellee on a joint and several promissory note executed by the appellee and one Sheeks. Issues were formed, denying the execution of the note, etc.; there was a trial by jury, a verdict for the plaintiff, a motion by the defendant for a new trial overruled, and final judgment rendered on the verdict against him. The defendant appealed to this court, where the judgment of the common pleas was, in all things, affirmed. *Maiden v. Webster*, 30 Ind. 317. The judgment in the common pleas was rendered on the 17th day of February, 1868, and was affirmed in this court during the November term, 1868.

On the 7th day of January, 1870, a written motion was filed in the clerk's office of the common pleas, by the defendant, to set aside the judgment rendered on the 17th day of February, 1868. The grounds stated in this motion are the following: "That said judgment was obtained by fraud upon the part of the plaintiff in this; the plaintiff, Reuben J. Webster, colluded and conspired with Daniel C. Viers and one McDaniel to cheat and defraud this defendant, Thomas G. Maiden, in this: the said note sued upon herein was never signed by this defendant, neither was the name of this defendant signed to said note by any person thereunto lawfully authorized. The name of this defendant appears, upon the face of said note, to have been signed by one Sheeks; that said Sheeks had no authority whatever, either direct or indirect, express or implied, to sign the name of this defendant to said instrument, or any other obligation whatever; but said Reuben J. Webster, Daniel C. Viers, and McDaniel, for the purpose of defrauding this defendant, knowingly, falsely, and fraudulently, while under oath as witnesses on behalf of said plaintiff, stated to the jury, upon the trial of said cause, that said Sheeks and Maiden were in partnership in dealing in grain at a certain warehouse in Remington, Jasper county, Indiana, at the date of said note, and said Webster falsely and fraudulently represented and testified as witness aforesaid that said note was given by said Sheeks for money (one thousand dollars) loaned by

Webster v. Maiden.

him (Webster) to Sheeks and Maiden, to be used in said grain business at, etc., and that said Sheeks signed the name of Maiden to said note by his authority as such partner; that all of said evidence was knowingly, wilfully, falsely, and fraudulently given to the court and jury, in said case, to deceive the said court and jury and defraud this defendant; and the said court and jury were thereby deceived, and this defendant thereby defrauded in a large amount, so that said defendant is almost broken up; that said evidence was the sole and only evidence upon which defendant was held liable upon said note, and said witnesses were all who testified for the plaintiff; that since said trial, and recently, this defendant has learned that he can establish the truth and fact in this case to be that said Webster did not loan any money to said Sheeks, and that instead of this defendant and said Sheeks being in partnership in said grain trade, which they never were at any time, the said Webster and said Sheeks were partners in the said grain trade at said time and place, and that about the date of said note, October 19th, 1864, said Sheeks and Webster lost money largely in said grain business, and said Webster made a pretended sale of his interest in the said grain business to said Sheeks, and got said Sheeks to execute to him the note sued upon herein, and procured said Sheeks to sign the name of this defendant to said note, the said Sheeks and Webster well knowing at the time that said Sheeks had no authority whatever to sign said note; that it was so procured by said Webster to cheat and defraud this defendant, the said Webster well knowing that said Sheeks was, at the time he signed the same, largely involved and insolvent, and said sale by said Webster being a mere sham, he knowing that said amounts he and Sheeks had invested in the grain trade had all been lost, and that the note was wholly without consideration, but was, by collusion between said Sheeks and Webster, fraudulently drawn for the purpose aforesaid, all of which this defendant has but recently learned that he can fully prove. Reference is then made to certain affidavits filed with the motion, and it

is stated that two additional paragraphs of answer are presented, which the defendant proposes to file, if the judgment shall be set aside. It is also stated that of the facts set up in these new paragraphs of answer the defendant had no knowledge at the time of the former trial, although diligent search had been made by him; that he believes he will be able to prove the facts stated, and that he believes if he had known these facts he could have made a successful defence at the former trial; and that said judgment was obtained against him "through his mistake, inadvertence, surprise, and excusable neglect, in this:" He was surprised, on the trial of said cause, to hear said Webster, Viers, and McDaniel swear that he (Maiden) was a partner of Sheeks in the grain trade at Remington, Indiana; that he had no means of foreknowing that they had thus colluded to defraud him, and that they would thus fraudulently and falsely swear to what they knew was false; at the time they were so permitted to testify, during the progress of the trial, this defendant did not know where he could obtain the evidence to establish the fact that such statements were false and fraudulent, but he has since, and recently, learned of the evidence he desires to introduce, and herewith refers to the above affidavits; that the evidence he will procure is at and near Remington, etc., some seventy-five miles distant from the residence of this defendant, which is in, etc.; that because of said distance, and his being wholly unadvised that such evidence would be pertinent and needed, he was unable to produce the same on the former trial, and for the want of the same the said fraudulent advantage was taken of this defendant that gave the plaintiff said judgment. Reference is made to the affidavits filed of his attorneys in the cause at the time of the rendition of the judgment to explain an apparent neglect on his part. He states that he is in limited circumstances, and that the said judgment will sweep from him all his property. Because of all which facts he enters his motion under section ninety-nine of the code, and prays the court to set aside the judgment, grant him leave to file

Webster v. Maiden.

said additional paragraphs of answer, and for such other and further relief as he may be entitled to in equity and good conscience. The motion is verified by the oath of Maiden.

The plaintiff objected to the motion by demurring thereto, but his demurrer was overruled. He then asked leave to controvert the facts alleged, which motion was also overruled, and he was not allowed to answer to the motion, or to introduce any evidence in opposition to its statements. Exceptions were duly taken to these rulings. And the court thereupon, upon the written motion and the affidavits in support thereof, set aside the judgment, to which the plaintiff excepted, and allowed the defendant to file the additional paragraphs of answer; issues were again formed, and there was a trial thereof, verdict for the defendant, motion for a new trial by the plaintiff overruled, and final judgment rendered for the defendant. The plaintiff appealed, and has assigned as error the overruling of his demurrer to the motion to set aside the judgment, the refusing to allow him to answer the motion, and the setting aside the judgment; also the overruling of the demurrer of the plaintiff to the fifth paragraph of the answer of the defendant, the overruling his motion for judgment, notwithstanding the verdict, and the refusal to grant him a new trial.

The appellee has assigned as a cross error the sustaining of the demurrer of the plaintiff to the second paragraph of the answer. The appellant asks that the proceedings subsequent to the rendition of the first judgment may be reversed and set aside; and the appellee asks that if there shall be a reversal, the judgment and proceedings may be reversed back to the sustaining of the demurrer of the plaintiff to the second paragraph of the answer, including, of course, the first judgment.

We may as well in this as in any other part of this opinion state what we have determined with reference to the cross error assigned. The sustaining of the demurrer to the second paragraph of the answer was one of the errors assigned when the case was here before. The question was

fully considered, and decided against the party now assigning it for error. We do not see how there can well be any diversity of opinion with reference to the question. Hence we hold that there was no error in that ruling.

The question relating to the regularity of the action of the court upon the motion to set aside the first judgment is, we think, one, the decision of which must dispose of the case, so far as this appeal is concerned. The appellee insists that the case is one where the party might have relief against the judgment according to section ninety-nine of the code, while the appellant contends that the opposite of this is true.

There are three steps or proceedings which may, to some extent, at least, involve the facts of the case, to which a party may resort after judgment has been rendered against him in the same court. Any person who is a party to any judgment, or the heirs, devisees, or personal representatives of a deceased party, may file, in the court where such judgment is rendered, a complaint for a review of the proceedings and judgment, at any time within three years next after the rendition thereof. Any person under legal disabilities may file such complaint at any time within three years after the disability is removed. But no complaint can be filed for a review of a judgment for a divorce. The complaint may be filed for any error of law appearing in the proceedings and judgment, or for material new matter, discovered since the rendition thereof, or for both causes, without leave of the court. 2 G. & H. 279, secs. 586, 587.

In this proceeding the parties have the right to form issues of law and fact as in other cases, and, of course, to have a trial of them in the ordinary way. It is clear that, under the decisions of this court, and upon the facts stated, the proceeding in this case for relief against the judgment was not commenced under this part of the code, and that it cannot be sustained as a complaint to review the judgment. It was supposed that fraud in obtaining a judgment may be

shown as a cause for review of the judgment. *Quick v. Goodwin*, 19 Ind. 438. But it has been several times held, that "new matter," within the contemplation of the code, means something more than newly-discovered evidence, and that a complaint to review a judgment cannot be sustained on account of newly-discovered evidence merely. *Fleming v. Stout*, 19 Ind. 328; *Nelson v. Johnson*, 18 Ind. 329; *Hall v. Palmer*, 18 Ind. 5.

Another mode of obtaining relief from a judgment rendered is by an application for a new trial. This mode is resorted to much more frequently than any other. Generally the application is made during the term at which the verdict or decision is made. 2 G. & H. 215, sec. 354. But where causes for a new trial are discovered after the term at which the verdict or decision was rendered, the application may be made by a complaint filed with the clerk not later than the second term after the discovery, on which a summons shall issue, as on other complaints, requiring the adverse party to appear and answer it on or before the first day of the next term, and the application is to stand for a hearing at the term to which the summons is returned executed, and it is to be summarily decided by the court, upon the evidence produced by the parties. But no such application can be made later than one year after the final judgment was rendered. 2 G. & H. 215, sec. 356. Every application for a new trial implies, of necessity, that there has already been one trial of the issue or question involved.

Another mode of obtaining relief from a judgment rendered against the party, is by an application to the court under section 99, 3 Ind. Stat. 373. That section provides, that "the court may at any time, in its discretion, and upon such terms as may be deemed proper, for the furtherance of justice, direct the name of any party to be added or struck out, a mistake in name, description, or legal effect, or in any other respect, to be corrected, any material allegation to be inserted, struck out or modified, to conform the pleadings to the facts proved, when the amendment does not substan-

tially change the claim or defence. The court may also in its discretion allow a party to file his pleadings after the time limited therefor, and shall relieve a party from a judgment taken against him, through his mistake, inadvertence, surprise or excusable neglect, and supply an omission in any proceedings on complaint or motion filed within two years."

Under this section, we are informed by the written motion, the application in question was made. In the case under consideration, there had been issues of fact formed, which were tried by a jury; there was a verdict for the plaintiff, a motion for a new trial made and overruled, and a final judgment rendered for the plaintiff. An appeal from the judgment to this court had resulted in an affirmance of the judgment. After all this, a motion was made, which, stripping it of merely useless words, shows nothing more, if it shows anything material, than the discovery of new evidence relating to the issues which were disposed of in the former trial of the cause; and upon this application, supported by affidavits wholly *ex parte*, the judgment, which had been rendered on a verdict based upon the merits of the cause, after a full and fair trial, is annulled and set aside. In our judgment, such a practice is wholly unwarranted and unjustifiable. We are clearly of the opinion that that part of section 99 relating to relief from a judgment taken against the party through his mistake, inadvertence, surprise, or excusable neglect, is not intended to authorize the court to grant such relief from a judgment based upon a verdict which was the result of a trial in a case where issues had been formed, where both parties appeared and participated in such trial, and where the ground of such application is the subsequent discovery, or alleged discovery, of new evidence relating to the issues which were so tried. It was, no doubt, intended to apply to cases where, for some reason growing out of the mistake, inadvertence, surprise, or excusable neglect of the party, the merits of the case have not been put in issue, tried, and decided. To hold otherwise, and sanction

the action of the common pleas, would be to decide that any judgment rendered upon the most thorough and complete examination of the facts, might be set aside, at any time within two years, upon a mere *ex parte* showing by affidavits. We think that no case can be found decided by this court which gives any countenance to any such construction.

But this can hardly be regarded as an open question in this court. In *Nelson v. Johnson*, *supra*, it is said: "But we propose first to ascertain the statute by virtue of which this proceeding is sought to be maintained. Section 99 of the code allows the court 'to relieve a party from a judgment taken against him through mistake,' etc. This section seems to have reference to cases in which the ground of relief is limited to the act of taking or rendering the judgment, as in cases of default, and does not look to errors which occur during the progress of a cause where both parties are present in court. The following cases belong to this class: *Frazier v. Williams*, 18 Ind. 416; *Robertson v. Bergen*, 10 Ind. 402; *Woolley v. Woolley*, 12 Ind. 663, which was a judgment by default." Many other similar cases, which have since been decided, might be added.

It is insisted by counsel for the appellee that, aside from the authority given to the courts of the State by section ninety-nine, they have all the equity powers that have long been recognized in English jurisprudence, to set aside judgments for fraud, and it is claimed, as we understand counsel, that the action of the court may be sustained on this ground. If we concede that this position is correct in point of law, it would hardly follow that the court could exercise these chancery powers upon a mere *ex parte* showing, as was done in this case, upon a simple motion. It need not be controverted that the courts of this State may, upon a proper proceeding in a proper case set aside a judgment for fraud. We do not decide that this may not be done. We do decide that it could not be done in this case, for the reason and in the manner in which it was done.

The proceedings in the cause, subsequent to the rendition

of the first judgment on the 17th day of February, 1868, are reversed, with costs, and the cause remanded, with instructions to overrule the motion to set aside the judgment.

S. C. Willson, L. B. Willson, J. McCabe, and J. M. Butler, for appellant.

J. Buchanan, for appellee.

FATMAN ET AL. v. LEET ET AL.

AGENT. — *General.* — *Special.* — *Limitation of Authority.* — *Notice.* — Where a firm commissioned S. to purchase, not a particular lot or quantity of tobacco merely, but to purchase generally Kentucky tobacco, of the crop grown in the year 1866, at Oak Lawn and vicinity, on their account and for their benefit, and to receive the same, have it assorted, etc., prized, and put in hogsheads and placed on the bank of the river, ready for shipment, and the agreement between the firm and said agent stipulated that he should purchase only for cash, and should not give the firm signature to any obligation;

Held, that where the agent did purchase on credit, and gave the receipt of the firm, and it did not appear that the seller had any notice of the want of authority in the agent to purchase on credit, the firm would be liable, although they had settled with the agent, supposing he had obeyed his instructions, and paid for the tobacco with money furnished by them for that purpose. The authority to purchase, unless restricted, carried with it the authority to purchase on time and on the credit of the principals. The firm, by making S. their agent to purchase, and not making known the terms upon which he was to purchase, justified those dealing with him in believing he was authorized to purchase on credit. The fact that this restriction on their agent to purchase for cash only was known in the neighborhood, unless brought to the knowledge of the seller, would not avail the firm.

PRACTICE. — *Demurrer.* — *Several Plaintiffs.* — If two or more persons unite in an action, a cause of action must be stated in favor of all of them, or a demurrer for want of sufficient facts will be sustained.

APPEAL from the Vanderburg Circuit Court.

WORDEN, J. — In this case judgment was rendered in favor of Oberdorfer against Lewis Fatman and others, but errors are assigned, by inadvertence we suppose, in the names of

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133	658
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Leet and Oberdorfer as appellants, against Lewis Fatman and others as appellees. As it was evidently intended to make Fatman and others appellants, we shall regard them as such, and treat the assignment of errors accordingly.

The action was brought by James Z. Leet and Simon Oberdorfer against Lewis Fatman, and several others who were the heirs-at-law of Joseph T. Fatman, deceased. The complaint alleges, that in July, 1867, Lewis Fatman and Joseph T. Fatman, under their firm name of Fatman & Co., purchased from the plaintiff Leet a quantity of tobacco, specifying the quantity, amounting in value, at the stipulated price, to the sum of five hundred and forty-six dollars and eighty-two cents; that receipts were executed for the tobacco as delivered, which are set out, and were signed, "Fatman & Co., by James Steelman;" that after the sale, Joseph T. Fatman died intestate, leaving a thousand dollars each to his said heirs, and that he has no personal representatives; that Leet assigned the claim to Oberdorfer, which remains due and unpaid. Prayer that Oberdorfer recover, etc.

The defendants answered in six paragraphs. The first was the general denial; fourth, payment. The third was withdrawn. Demurrers were sustained to the second, fifth, and sixth. Reply, in denial of the fourth. The issue of fact thus joined was tried by the court, who found for the plaintiff Oberdorfer, against the defendants, for the amount of the claim, and rendered judgment accordingly.

Errors are assigned upon the ruling of the court in sustaining the demurrers to the second, fifth, and sixth paragraphs of the answer, and also in overruling a motion for a new trial. The record does not show that any motion for a new trial was made at all.

The paragraphs of the answer, to which demurrers were sustained, were designed to set up substantially the same defence; and as the sixth is, perhaps, the fullest and most complete, we need only notice that.

Perhaps, by condensing the paragraph, we might, in some measure, impair its force; hence we set it out in full:

"For a further answer to the plaintiffs' complaint herein, the defendants say that on the — day of —, 1867, the firm of Fatman & Co. appointed one James R. Steelman their special agent to purchase tobacco under certain limitations and restrictions, which are fully stated in a certain instrument in writing executed by Fatman & Co. and the said Steelman, and delivered to said Steelman as his authority, a copy of which is filed with the second paragraph of the answer herein, and referred to as a part of this additional answer. And defendants say that said Steelman had no other authority as their agent except as conferred in said instrument in writing; neither did they, in any way, hold out to the community that the said Steelman was authorized to act for them otherwise than as provided in said instrument. And defendants say that the plaintiff, James Z. Leet, sold the tobacco mentioned in the complaint, to said Steelman as the agent of said Fatman & Co. as aforesaid, and that the said Steelman, in violation of his authority as agent, which provided, that he should purchase for cash only, pledged the credit of the said Fatman & Co. to the said Leet for said tobacco, agreeing, in consideration of the delivery of said tobacco, that the said Fatman & Co. would, at a future day, pay the said Leet therefor, and the said Leet thereupon delivered said tobacco to said Steelman without receiving payment therefor from the said Steelman. And the defendants say that at all times they furnished the said Steelman with the funds wherewith to pay for tobacco purchased by him as their agent as aforesaid, and that at the time of the purchase of said tobacco from said Leet, the said Steelman had in his possession funds of the said Fatman & Co. with which to pay therefor.

"And the said defendants further say that the firm of Fatman & Co. had been doing business in the purchase of tobacco, by and through their agents, in the neighborhood where the said James Z. Leet resided for several years, and had so purchased large quantities of tobacco from a large number of persons, and that it was invariably their habit and

Fatman et al. v. Leet et al.

custom to restrict their said agents to purchase for cash, which was well known in said neighborhood.

"And afterward, to wit, on the — day of —, 1867, the said Fatman & Co. settled their accounts with the said Steelman, as their agent as aforesaid, and allowed him in said settlement, as a credit, the full amount agreed to be paid for the tobacco purchased from the said Leet, to wit, the sum of five hundred and forty-six dollars and eighty-two cents, the said Steelman having exhibited to said Fatman & Co. what purported to be a receipt signed by the said Leet for said amount of money as the purchase-money for said tobacco."

The written instrument referred to in the foregoing paragraph is as follows:

"Articles of agreement made and entered into this 5th day of December, 1866, by and between Fatman & Co., of the city, county, and State of New York, parties of the first part, and James R. Steelman, of Oak Lawn, Davis county, and State of Kentucky, of the second part, witnesseth:

"1. The same James R. Steelman, party of the second part, hereby agrees and binds himself to buy Kentucky tobacco, of the crop grown in the year 1866, at Oak Lawn, Kentucky, and immediate vicinity, for the benefit and account of Fatman & Co., parties of the first part, and he is to be governed by them or their authorized agents, as to the quality, quantity, manner of buying, and prices he shall pay for all purchases, and in all matters appertaining to the general conduct of the business. He also agrees to receive all such tobacco purchased, compelling a strict compliance with contracts, and, if necessary, have same tobacco hung up and redried, and when in proper condition, have same carefully and neatly selected, each quality, color, and size to itself; after which said tobacco is to be prized in good merchantable order, and in good substantial hogsheads, and to deliver same ready for shipment on the bank of Green River, at Old Crossing, Kentucky.

"2. The said James R. Steelman, party of the second part, agrees to stop buying immediately when so ordered by

Fatman & Co., parties of the first part, and he makes it a part of this agreement to take written contracts for all the different crops of tobacco he may purchase, said contracts to be taken on blanks to be furnished by Fatman & Co., parties of the first part, and to take receipts for all moneys paid out for said tobacco, and deliver up such vouchers at the close of the tobacco prizing season to Fatman & Co., parties of the first part; and it is understood that no claim on account of tobacco, or for any expenditure whatever, will be allowed on settlement, unless a proper voucher is exhibited. He further agrees to keep a regular set of books, showing planters' names, number of pounds tobacco received and paid for, and the various prices paid for same, which book is to be ready at all times for inspection and examination by Fatman & Co., parties of the first part, or their authorized agents. It is also understood that all purchases of tobacco, or materials and labor, are to be made exclusively for cash; and the said James R. Steelman, party of the second part, is not authorized to issue notes or due bills in the name of Fatman & Co., for any purpose whatever; and he further agrees to receive all tobacco in such manner that an unusual loss in weight shall not accrue, and agrees to be responsible for, and will refund, any amount in excess of reasonable loss; said loss not to exceed one per cent. of the net weight.

"3. It is distinctly understood between the parties to this agreement, that it covers all tobacco bought, or caused to be bought, directly or indirectly, during the tobacco season of 1866-67, by the said James R. Steelman, party of the second part, if in accordance with instructions received from Fatman & Co., parties of the first part, or their authorized agents; and the said Fatman & Co., parties of the first part, reserve the right to reject any crop of tobacco that is not purchased in accordance with instructions received from them, either as regards quality or price.

"4. Fatman & Co., parties of the first part, agree to furnish all necessary funds to carry on the business, at such

Fatman et al. v. Leet et al.

times and in such sums as the necessity of the business shall require; and it is further understood that all moneys so furnished shall be applied exclusively to the purposes herein stated.

"5. Fatman & Co., parties of the first part, agree to pay to James R. Steelman, party of the second part, one dollar for each and every hundred pounds of tobacco so bought, received, prized, and delivered in accordance with all the provisions of this agreement, as a remuneration for his services and expenditures; and it is understood by both parties that the said one dollar per hundred pounds covers all claims for services and expenditures, of any nature whatever, on any lot of tobacco purchased under this agreement. Given under our hands," etc.

Do the facts alleged preclude a recovery? This question must be answered by a reference to the authority conferred by Fatman & Co. on Steelman, their agent. Agencies are classified as general and special, or particular. We quote the following passages on this subject, from 1 Parsons Con. 40:

"A general agent is one authorized to transact all his principal's business, or all his business of some particular kind. A particular agent is one authorized to do one or two special things. But it is not always easy to find a precise rule which determines with certainty between these two kinds of agency.

"A manufacturing corporation may authorize A. to purchase all their cotton, and he is then their general agent for this special purpose, or to purchase all the cotton they may have occasion to buy in New Orleans, and then he may be called their general agent for this special purpose in that place. Or to purchase the cargoes that shall come from such a plantation, or shall arrive in such a ship or ships, or five hundred bales of cotton, and then he should rather be regarded as their particular agent for this particular transaction.

"The importance of the distinction lies in the rule, that if a particular agent exceed his authority, the principal is not bound; but if a general agent exceed his authority, the

principal is bound, provided the agent acted within the ordinary and usual scope of the business he was authorized to transact, and the party dealing with the agent did not know that he exceeded his authority."

Tested by the descriptions thus given of general and special agencies, it would seem that Steelman was the general agent of Fatman & Co., for the purchase of tobacco at the price mentioned. Fatman & Co. were dealers in tobacco, having been engaged, as is alleged, in the business of purchasing the same, in the neighborhood where Leet resided, for several years. They commissioned Steelman to purchase, not a particular lot or quantity of tobacco merely, but to purchase, generally, Kentucky tobacco, of the crop grown in the year 1866, at Oak Lawn and vicinity, on their account and for their benefit. He was not only to purchase the tobacco, but was to receive the same, have it assorted, etc., prized, and put in hogsheads and placed on the bank of the river, ready for shipment. He was to be governed in all matters appertaining to the general conduct of the business, by Fatman & Co., or their agents. He, doubtless, violated his agreement with his principals, as well as exceeded his authority, in purchasing the tobacco on time, and pledging the credit of his principals therefor. But as it does not appear that Leet had any notice of the stipulation in the agreement, that Steelman was to purchase for cash only, and not on the credit of his principals, he cannot be held bound by it. He is, therefore, entitled to recover, on the theory of the law above stated.

But the question admits of some further consideration. The author already quoted from proceeds, page 43: "We think the distinction between a general agent and a special agent useful, and sufficiently definite for practical purposes, although it may have been pressed too far, and relied upon too much in determining the responsibility of a principal for the acts of an agent. It may indeed be said, that every agency is, under one aspect, special, and under another, general. No agent has authority to be in all respects and for

Fatman et al. v. Leet et al.

all purposes, an *alter ego* of his principal, binding him by whatever the agent may do in reference to any subject whatever; and therefore the agency must be special so far as it is limited by place, or time, or the extent or character of the work to be done. On the other hand, every agency must be so far general, that it must cover not merely the precise thing to be done, but whatever usually and rationally belongs to the doing of it.

"Of late years, courts seem more disposed to regard this distinction and the rules founded upon it as altogether subordinate to that principle which may be called the foundation of the law of agency; namely, that a principal is responsible, either, when he has given to an agent sufficient authority, or, when he justifies a party dealing with his agent in believing that he has given to this agent this authority." See, also, *Mechanics' Bank v. New York and New Haven R. R. Co.*, 13 N. Y. 599.

Did Fatman & Co. justify Leet in believing that they had given Steelman authority to purchase tobacco on their credit?

They were dealers in tobacco, and they commissioned Steelman to purchase for them, as above stated. The agreement between Fatman & Co. and Steelman was evidently not intended for the public eye, nor does it appear to have been made public. The main object of the agreement seems to have been to regulate and determine the rights of the parties thereto, as between themselves. The stipulation in the agreement that the tobacco was to be purchased by the agent for cash only, and not on credit, can have no greater force as against one selling tobacco to the agent for his principals, than private instructions to the agent would have. Such private instructions could not vary the rights which a person dealing with the agent would otherwise have. We quote, on this point, a paragraph from the opinion of the court in *Hatch v. Taylor*, 10 N. H. 538: "No man is at liberty to send another into the market, to buy or sell for him, as his agent, with secret instructions as to the manner in which he shall execute his agency, which are not to be communicated to

those with whom he is to deal; and then, when his agent has deviated from those instructions, to say that he was a special agent—that the instructions were limitations upon his authority—and that those with whom he dealt, in the matter of his agency, acted at their peril, because they were bound to inquire, where inquiry would have been fruitless, and to ascertain that of which they were to have no knowledge. It would render dealing with a special agent a matter of great hazard."

Steelman was the authorized and recognized agent of Fatman & Co. in the purchase of the tobacco, and we think the authority to purchase, unless restricted, carried with it the authority to purchase on time, and on the credit of the principals. Fatman & Co., by making Steelman their agent for the purchase of tobacco, as above stated, and by not making known the terms upon which he was to purchase, justified those selling tobacco to the agent in believing that he was authorized to purchase on credit as well as for ready cash.

It appears, by the answer, that in the previous purchases of tobacco by Fatman & Co., it was their invariable custom to restrict their agents to purchases for cash only, and that this was well known in the neighborhood. This was not notice to Leet of the restrictions upon the new agent, Steelman. Leet does not appear to have ever before sold any tobacco to the agents of Fatman & Co., nor to have lived in the neighborhood at the time of the previous purchases, nor to have been otherwise cognizant of the previous custom alleged. Beside this, the exigencies of trade and commerce sometimes make it quite convenient for those whose purchases are usually made for cash to have the benefit of credit.

Under any aspect in which the case can be viewed, we are of opinion that the matter set up cannot bar the action. The fact that Fatman & Co. subsequently settled with their agent, and allowed him credit for the money supposed to have been paid by him for the tobacco in question, cannot affect Leet. Fatman & Co. placed Steelman in a situation that

Fatman et al. v. Leet et al.

enabled him to perpetrate the fraud, and they must bear the loss. The ruling on the demurrer was right, and must be sustained.

No question is made as to the right to maintain the action as against the heirs of the deceased partner, and we make none.

It is objected, however, that the demurrer to the answer reaches back to the complaint, and that the complaint is bad in not showing any cause of action in favor of Leet, he having assigned the cause of action to Oberdorfer. Leet, if a party at all, should have been made a defendant, to answer to the assignment of the cause of action. 2 G. & H. 38, sec. 6. No demurrer was filed, however, because he was not made a defendant, hence no objection can be now made on that ground. *Musselman v. Kent*, 33 Ind. 452.

If Leet is to be regarded as a plaintiff, and if a demurrer had been filed to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, it should have been sustained, because if two or more persons unite in an action, a cause of action must be stated in favor of all of them. But we doubt whether Leet should be regarded as plaintiff at all. He is named as such in the complaint, but no relief was asked in his favor. Judgment was prayed only in favor of Oberdorfer, and it was rendered accordingly. However this may be, we think the irregularity in naming Leet as a plaintiff instead of defendant, no objection being made thereto in the court below, cannot, and ought not, to have the effect of reversing the judgment, the cause having been tried on its merits and fairly determined in the court below. 2 G. & H. 278, sec. 580.

The judgment is affirmed, with costs.

B. Hynes, for appellants.

A. Dyer, for appellees.

The Etchison Ditching Association v. Jewell.

HEATON v. BUTLER ET AL.

APPEAL from the Decatur Common Pleas.

WORDEN, J.—The appellees in this case recovered a judgment below against Hiram Soloman and Thomas Heaton. Heaton alone appeals, errors being assigned in his name only as appellant. Soloman has not been notified, as required by statute. In accordance with numerous decisions of this court, the appeal must be dismissed. Besides this, the record comes up under the seal of the circuit court, instead of the court in which the proceedings were had.

The appeal is dismissed, at the costs of the appellant.

C. Ewing and J. K. Ewing, for appellant.

J. S. Scobey and O. B. Scobey, for appellees.

THE GREENSBURGH, MILFORD, AND HOPE TURNPIKE COMPANY
v. REED ET AL.

APPEAL from the Bartholomew Common Pleas.

PETTIT, C. J.—This case, in all legal aspects, is the same as that of *The Greensburgh, Milford, and Hope Turnpike Co. v. Sidener*, 40 Ind. 424.

The judgment is in all things affirmed, at the costs of the appellant.

F. S. Hord, for appellant.

S. Stansifer, for appellees.

THE ETCHISON DITCHING ASSOCIATION v. JEWELL.

APPEAL from the Madison Circuit Court.

PETTIT, C. J.—In all legal respects, this case is the same as the *Etchison Ditching Association v. Hillis*, 40 Ind. 408;

Bash et ux. v. Evans.

and on the authority of that case, the judgment in this is affirmed, at the costs of the appellant.

M. S. Robinson and W. March, for appellant.

J. W. Sansberry and E. B. Goodykoontz, for appellee.

VINES v. LONGACRE.

APPEAL from the Ripley Circuit Court.

PETTIT, C. J.—All questions in this case arise on the evidence given, or offered and rejected by the court. The case was finally disposed of on the 19th day of March, 1870, and sixty days were given to file a bill of exceptions. A bill of exceptions, which is copied into the transcript, purports to be signed by the judge on the 1st day of May, 1870, but it does not appear when it was filed by the clerk or placed in his office. Following numerous decisions and rulings, which must be familiar to the bar of the State, we must hold that the bill of exceptions is not properly a part of the record, and consequently there is no further question before us.

The judgment is in all things affirmed, at the costs of the appellant.

E. P. Ferris and H. T. Lipperd, for appellant.

BASH ET UX. v. EVANS.

APPEAL from the Huntington Common Pleas.

PETTIT, C. J.—This suit was brought by the appellee against Henry Bash, Susan Bash, his wife, and Enos V.

Robbins. The defendants, all of them, remained in the case till its end below, and a decree and judgment were rendered there against all of them; but Bash and wife only have appealed, and have not complied with section 551 of the code, 2 G. & H. 270; and following the uniform rulings of this court, the appeal must be dismissed.

The appeal is dismissed, at the costs of the appellants.

J. R. Slack, for appellants.

J. A. Fay, for appellee.

THE CITY OF EVANSVILLE *v.* MARTIN ET AL.

CITY.—*Nuisance*.—A city of this State incorporated under a charter authorizing the common council "to regulate all wharves on the shore of the Ohio river, adjoining said city," cannot by ordinance define the line of high-water mark, and declare the erection of buildings below said line a nuisance, and impose a fine upon persons erecting such buildings on their own land.

APPEAL from the Vanderburg Circuit Court.

DOWNNEY, J.—The common council of the city of Evansville passed the following ordinance:

"An ordinance in relation to private and public wharves and the shore of the Ohio river in front of the city of Evansville, declaring certain things thereon erected or placed to be nuisances, and providing for the establishment of a water-line at high-water mark, having been once read, rule 18 was unanimously suspended, and the ordinance again read and passed, as follows, viz.: An ordinance in relation to private and public wharves and the shore of the Ohio river in front of the city of Evansville, declaring certain things thereon erected or placed to be nuisances, and pro-

The City of Evansville v. Martin *et al.*

viding for the establishment of a water-line at high-water mark.

"SECTION 1. *Be it ordained by the Common Council of the City of Evansville*, That any house, storehouse, warehouse, shop, shed, structure of any kind whatsoever, or any part thereof, hereafter erected or placed on any private or public wharf, or any place for the landing of boats or water-crafts of any kind whatever, navigating or brought to said city upon the waters of the Ohio river, or any part of the shore of said river, below the line of high-water mark, at any place within the corporate limits of the city of Evansville, is hereby declared to be a nuisance.

"SEC. 2. That any person or persons who shall erect or place, or cause to be erected or placed, any house, storehouse, warehouse, shop, shed, or other building or structure of any kind whatsoever, or any part thereof, below high-water mark, at any point, upon any public or private wharf, or any part of the shore of the Ohio river, within the corporate limits of the city of Evansville, contrary to the provisions of this ordinance, shall, on conviction, forfeit and pay the sum of one hundred dollars for every such offence, and the further sum of one hundred dollars for each day during which any such house or structure shall be permitted to remain upon such wharf or river shore, below high-water mark, as aforesaid.

"SEC. 3. That it shall be the duty of the city surveyor, as soon as practicable after the passage of this ordinance, to survey and mark the line of high-water mark upon and along the wharves and shore of said Ohio river, in front of and within the corporate limits of the city of Evansville, and return to the common council of said city a report of said survey, with a plat or diagram of the same, showing at or opposite all street intersections, the distance from the upper line of Water street and the line of Front street to the line of high-water mark; said line to be designated and known as the water-line of the city of Evansville."

The following complaint was filed against the appellees before the recorder of the city:

"The City of Evansville *v.* Robert M. Martin, Lee M. Gardner, and Marsh Atkisson. State of Indiana, Vanderburg County, City of Evansville, ss.

"Edward Ingle, being duly sworn, deposes and says, that on the 17th day of February, 1870, the common council of the city of Evansville duly passed an ordinance, a copy of which is hereto attached and herewith filed, entitled 'an ordinance in relation to private and public wharves and the shore of the Ohio river in front of the city of Evansville, declaring certain things thereon erected or placed to be nuisances, and providing for the establishment of a water-line at high-water mark,' whereby it is, among other things, ordained by the said city of Evansville, that any house, storehouse, warehouse, shop, shed, or structure of any kind whatsoever, or any part thereof, hereafter erected or placed on any private or public wharf, or on any place for the landing of boats or water-crafts of any kind whatever, navigating or brought to said city upon the waters of the Ohio river, or any part of the shore of said river, below the line of high-water mark, at any place within the corporate limits of the city of Evansville, is declared to be a nuisance.

"The affiant further says, that afterward, to wit, on or about the 8th day of September, 1870, contrary to said ordinance, one Robert M. Martin, Lee M. Gardner, and Marsh Atkisson, did, at and in said city of Evansville, in said county and State, erect, put, and place upon the private wharf of said Robert M. Martin, Lee M. Gardner, and Marsh Atkisson, within the corporate limits of said city of Evansville, and, as affiant is informed and believes, below high-water mark, and below the water-line heretofore, in pursuance of said ordinance, duly established, and at a place of landing for boats and other water-crafts in time of high water, a portion of a brick house or building, commonly called a tobacco warehouse, the same being so constructed as to obstruct the landing of boats and other water-crafts at said port and

The City of Evansville *v.* Martin *et al.*

place, in time of high water, contrary, as affiant verily believes, to the form and substance of said ordinance.

“E. INGLE.

“Subscribed and sworn to, November 10th, 1870.

“S. SORENSON, Clerk.”

The defendants were found guilty by the recorder, and judgment rendered against them. From this judgment they appealed to the circuit court. In the circuit court, on their motion, the complaint was quashed and the action dismissed. The city excepted, and appealed to this court. The error assigned calls in question the correctness of this ruling.

The city of Evansville is not incorporated or acting under the general law for the incorporation of cities, but under a special charter. The only provision in the charter relating to the question here involved, is that which authorizes the common council “to regulate all wharves on the shore of the Ohio river adjoining said city, whether the same be public or private, and the amount of wharfage to be charged at or for the use of the same.”

Counsel for the appellee assume and argue two positions with reference to the validity of the ordinance, claiming that in either view it is invalid; first, because, by a fair construction of the charter, the power to pass the ordinance is not intended to be conferred by the legislature; second, if the legislature intended to confer such a power, it is not constitutionally competent for them to pass the act; the legislature having no power themselves to impose such a restriction upon private rights, cannot delegate any such power to the common council.

On the other hand, counsel for the appellant contend that this ordinance is valid and binding.

The members of the court are all agreed that the judgment of the circuit court ought to be affirmed, but are not of one opinion as to the ground on which it should be done. For this cause it is not deemed necessary to state the reasons for their conclusion.

Stout, Administrator, v. The Indianapolis and St. Louis Railroad Company.

The judgment is affirmed, with costs.

W. F. Parrett, L. Wood, C. Denby, and D. B. Kumler, for appellant.

A. Iglehart, A. Dyer, and J. E. Iglehart, for appellees.



41	149
132	87

STOUT, ADMINISTRATOR, v. THE INDIANAPOLIS AND ST. LOUIS
RAILROAD COMPANY.

APPEAL.—*Superior Court.*—*Injury to Person.*—*Administrator.*—Where a judgment, recovered at a special term of the superior court, by a plaintiff, for an injury to his person, is reversed at a general term of said court, and remanded to special term for a new trial, and thereafter, the plaintiff dies, no appeal lies from such reversal to the Supreme Court, in favor of the administrator of the deceased.

APPEAL from the Marion Superior Court.

WORDEN, J.—This was a common law action by Peter Stout against the appellee, to recover damages for the alleged negligence of the defendant in so constructing her railroad and running her trains thereon as that the plaintiff, in driving along a highway crossing the railroad, without his own fault, was injured by a locomotive and train of cars.

The cause was tried at special term, and a verdict and judgment were rendered for the plaintiff for three thousand dollars damages. On appeal to general term, this judgment was reversed and the cause remanded to special term for a new trial. The plaintiff below excepted to the judgment below in reversing the judgment rendered at special term and remanding the cause for a new trial, and prayed an appeal to the Supreme Court.

The errors are assigned by Alfred Stout, as administrator of Peter Stout's estate. We must assume that Peter Stout, since the proceedings were had below, has died, and that Alfred Stout has been appointed his administrator.

The question arises whether the appeal can be prose-

Stout, Administrator, *v.* The Indianapolis and St. Louis Railroad Company.

cuted by an administrator. We are of opinion that it cannot. The action is not one that survives, but dies with, the person. "A cause of action arising out of an injury to the person, dies with the person of either party, except in cases in which an action is given for an injury causing the death of any person, and actions for seduction and false imprisonment." 2 G. & H. 330, sec. 782. This action is not within any of the exceptions above stated.

The plaintiff below, it is true, recovered a judgment against the defendant at special term, but that judgment was reversed at general term, and the cause remanded for a new trial. If the judgment of reversal thus rendered at general term should be reversed, the original judgment would stand. But as the record stands, the plaintiff below has no judgment, but has an action pending. Conceding that an appeal would have lain from the judgment of reversal thus rendered, directly to this court, before the final determination of the cause in the court below, had the plaintiff lived, still an appeal cannot lie in favor of an administrator in such case. We have seen that the action was for an injury to the person of the plaintiff, and dies with his person. Then we have the following statute on the subject of appeals to this court. "In case of the death of any or all the parties to a judgment before an appeal is taken, an appeal may be taken by, and notice of an appeal served upon, the persons in whose favor, and against whom, the action might have been revived, if death had occurred before judgment." 2 G. & H. 271, sec. 552.

Had Peter Stout died before judgment, the action could not have been revived in favor of his administrator, and hence the right of appeal to this court is not given to his administrator.

The appeal is dismissed, with costs.

L. Barbour, C. P. Jacobs, and C. W. Smith, for appellant.
M. A. Osborn, for appellee.

The State, *ex rel.* Howe, *v.* The Shelbyville and Chapel Turnpike Company.

THE STATE, EX REL. HOWE, *v.* THE SHELBYVILLE AND CHAPEL
TURNPIKE CO.

TURNPIKE.—*Articles of Association.—Corporation.—Construction of Statute.*

The statute (1 G. & H. 474) requiring that the articles of association of a gravel road company shall set forth the amount of capital stock, etc., contemplates a statement of the amount of the capital stock in the body of the articles of association; and the defect caused by the omission of such statement is not cured by the fact that certain amounts are subscribed to the articles.

APPEAL from the Shelby Circuit Court.

DOWNEY, J.—This was an information in the nature of a *quo warranto*, filed on the 24th day of September, 1869, by the appellant against the appellee. The information alleges the filing of articles of association by those composing the company, on the 17th day of October, 1863, in the office of the recorder of Shelby county, and relies upon defects therein as grounds for this proceeding. The articles of association are as follows:

“Articles of association of The Shelbyville and Chapel Turnpike Company.

“We, the undersigned, citizens of Shelby county, and State of Indiana, do hereby form ourselves into a corporation, according to an act authorizing the construction of plank, macadamized, and gravel roads, approved May 12th, 1852, for the purpose of constructing a turnpike or gravel road from Shelbyville to the Catholic chapel, all in the county of Shelby, and State of Indiana; said road to begin at the south end of Vine street, in said city of Shelbyville, and running thence in a south-easterly direction on and along the Michigan road, or as near thereto as may be deemed advisable by the board of directors of said company, to the Catholic chapel, on said Michigan road, in the north-west quarter of section thirteen, township twelve, range seven, in said county and State.

“First. The name and style of said corporation shall be The Shelbyville and Chapel Turnpike Company.

“Second. The capital stock of said company shall be

The State, *ex rel.* Howe, *v.* The Shelbyville and Chapel Turnpike Company.

_____, and is to be divided into shares of twenty-five dollars each.

"Third. We whose names are hereto subscribed agree to take the number of shares set opposite our respective names, and to pay for the same at such times and in such proportions as the board of directors of said corporation or company may direct, without relief from valuation or appraisal laws."

Then follow the names of the subscribers, with the number of shares and amount subscribed by each.

The statute requires that the articles of association shall set forth, first, the name which they assume; second, the line of the route, and the place to and from which it is proposed to construct the road; third, the amount of capital stock, and the number of shares into which it is divided; fourth, the names and places of residence of the subscribers, and the amount of stock taken by each. 1 G. & H. 474, sec. 1.

These articles of association do not conform to this statute. The amount of the capital stock is not stated. The fact that certain amounts are subscribed to the articles of association cannot cure this defect. The statute clearly contemplates a statement of the amount of the capital stock in the body of the articles of association, in addition to the statement of the amount of stock taken by each subscriber. The statement in the body of the articles of association fixes the total amount of the capital stock, and the subscription designates the amount taken by each subscriber. *The State v. The Bethlehem, etc., Gravel Road Co.*, 32 Ind. 357.

Other objections to the articles of association are urged, but we need not consider them.

The judgment of the court below, sustaining the demurrer to the information, was erroneous, and is reversed, with costs, and the cause remanded, with instructions to overrule the demurrer, and for further proceedings.

D. W. Howe, K. M. Hord, J. T. Hockman, and L. J. Hackney, for appellant.

E. H. Davis and C. Wright, for appellee.

Stewart v. The City of Jeffersonville, for the use of Sweeny et al.

STEWART v. THE CITY OF JEFFERSONVILLE, FOR THE USE OF
SWEENY ET AL.

CITY.—*Street Improvement.*—*Appeal.*—*Pleading.*—Upon appeal from a precept issued in favor of a contractor for work done in improving a street of a city, a complaint which does not aver that an advertisement for bids or the letting of the contract was ever made is bad on demurrer. PETTIT, C. J., dissented, holding that an averment that an advertisement for bids was made is an averment of a fact which must precede the letting of the contract, and which therefore cannot be inquired into on appeal.

APPEAL from the Floyd Common Pleas.

PETTIT, C. J.—This was an appeal from a precept of the common council of a city in favor of the contractors, for work done in improving a street, by Stewart, a property owner on the street. There was a demurrer to the complaint for want of sufficient facts sustained, and exception taken; and this ruling is assigned for error. The complaint does not show that an advertisement for bids or the letting of the contract was ever made. Following the ruling of this court in *Moberry v. The City of Jeffersonville*, 38 Ind. 198, and in *Baker v. Tobin*, 40 Ind. 310, we hold the complaint was bad, and that the demurrer to it should have been sustained.

The judgment is reversed, at the costs of the appellees.

I have written this opinion to meet the views and judgment of my brother judges, but I do not agree with it. The charter under which the city was organized and acting, and in reference to appeals from street improvement precepts, provides, "that no question of fact shall be tried which may arise prior to the making of the contract for the said improvement under the order of the council." 3 Ind. Stat. 102. I hold that, whether there was an advertisement for bidders given, is a fact which must precede the letting of the contract, and cannot be inquired into on an appeal in such a case as this, by demurrer or otherwise.

G. V. Howk and W. W. Tuley, for appellant.

J. H. Stotsenburg and S. S. Johnson, for appellee.

Allis et al. v. Nanson et al.

ALLIS ET AL. *v.* NANSON ET AL.

PLEADING.—*Damages, Mitigation of.*—Where matter may be given in evidence by a defendant, on the assessment of damages, in mitigation thereof, no pleading setting up such matter is needed, and therefore the sustaining of a demurrer to such a paragraph is harmless. *Catlett v. Gilbert*, 23 Ind. 614, criticised.

APPEAL from the Vanderburg Circuit Court.

WORDEN, J.—William G. Wear and Andrew Roberts replevied certain cotton from the possession of Robert H. Dunkerson and Alexander Wilson, who had the same in store for Nanson and others, the appellees herein. The cotton was delivered to the plaintiffs in the replevin suit, which was in the Vanderburg Circuit Court, and the usual undertaking was executed in that suit, on which Allis and Ruston, the appellants herein, became sureties. The plaintiffs in the replevin suit dismissed the same, and there was judgment in favor of the defendants therein for a return of the property, and for costs.

This was an action by Nanson and the other alleged owners of the property, including the warehouse-men, Dunkerson and Wilson, upon the undertaking in replevin, the complaint assigning proper breaches thereof. Allis and Ruston, the only defendants who seem to have been brought into court, answered as follows: "That as to all the sum claimed by the plaintiffs in their complaint, except nominal damages, the plaintiffs ought not to recover the same, or any part thereof, because they say that before the commencement of the action mentioned in the complaint, wherein said Wear and Roberts were plaintiffs, and the plaintiffs in this action were defendants, to wit, on the — day of —, 1865, the cotton mentioned in the complaint was the property of one Whitesides and one Chandler, and was held by them at Pine Bluff, in the State of Arkansas, they then and there doing business under the style of Whitesides & Co.; that said plaintiffs, Nanson and Ober, were then commission merchants, doing business in St. Louis, in the State of Missouri, under the name and style of Nanson, Ober & Co.;

that on the day and year last aforesaid, said Whitesides & Co. shipped to said Nanson, Ober & Co. (who already had in their hands cotton belonging to them), from Pine Bluff aforesaid, the cotton mentioned in the complaint, and then and there consigned the same to the said Nanson, Ober & Co. by bill of lading duly signed by the carrier to whom the cotton was delivered, by which said cotton was directed to be delivered to the said Nanson, Ober & Co., upon payment of freight and charges, at St. Louis aforesaid; that said bill of lading was duly forwarded by mail to Nanson, Ober & Co.; that on the day of the date of said bill of lading, said Whitesides & Co. drew a draft upon said Nanson, Ober & Co. for three thousand dollars; that upon the receipt of the bill of lading, and the presentation of said draft, said Nanson, Ober & Co. accepted said draft, and on its maturity paid it, and, out of the proceeds of the cotton theretofore shipped them, were reimbursed for one thousand five hundred dollars, part of said draft, leaving one thousand five hundred dollars unpaid; that said cotton, in transit from Pine Bluff to St. Louis, was seized and detained at Memphis, Tennessee, by the United States revenue officers, so that it was detained and never reached St. Louis; that upon the application of said Whitesides & Co., said cotton was redelivered to them, and by them sold to said Wear & Roberts, who paid full value therefor and took the same without notice of any claim on the part of said Nanson, Ober & Co., or any other person, and without notice of the existence of said bill of lading. And said defendants say that said Wear & Roberts having shipped said cotton to New York, said plaintiffs, Nanson, Ober & Co., pretending that they had a lien upon the same under the said bill of lading, for the satisfaction of said bill of exchange, seized the same at Evansville, and were so holding the same when the same was taken from them by the sheriff, by virtue of the order obtained by the said Wear & Roberts, as is alleged in said complaint."

A demurrer was sustained to this answer, and the de-

Allis et al. v. Nanson et al.

fendants excepted. The defendants not answering further, the court heard evidence adduced by the parties as to the plaintiffs' damages, and found that the cotton, at the time of the execution of the undertaking, was of the value of two thousand seven hundred dollars, and that there was due upon the bill of exchange described in the answer the sum of one thousand eight hundred and forty-one dollars and nineteen cents, and that the costs in the replevin suit were forty-two dollars and sixty cents, making in all the sum of one thousand eight hundred and eighty-three dollars and seventy-nine cents, for which amount judgment was rendered for the plaintiffs.

Error is assigned upon the ruling of the court in sustaining the demurrer, and in rendering judgment for the plaintiffs.

The answer was designed to raise an important question of commercial law, viz., whether Nanson, Ober & Co., to whom the cotton was consigned for sale by the owners, and who had made advances upon it by the acceptance and payment of the draft drawn by the owners, but to whose possession the cotton never came until after it had been sold and delivered by the owners to third parties, who purchased without notice, can hold the property against such third parties, in order to reimburse themselves for advances thus made.

We have not examined this question, for the reason that we should feel bound, under the authorities, to affirm the judgment, whatever might be the conclusion at which we might arrive upon the question.

In an action upon an undertaking in replevin, an answer that the property belonged to the plaintiff in replevin is not a good answer in bar of the action, because it does not answer the technical breach of a failure to prosecute the action with effect. *Sherry v. Foresman*, 6 Blackf. 56; *Wallace v. Clark*, 7 Blackf. 298.

In the case last cited, it was held that upon the execution of a writ of inquiry, in an action upon a replevin bond, where the right to the property had not been adjudicated

upon and settled in the replevin suit, it may be proved, in mitigation of damages, that the property belonged to the plaintiff in the replevin suit. We see no good ground to question the correctness of this decision.

The matter set up in the answer in the case before us is not pleaded in bar of the entire action, but in bar of all but nominal damages. It is pleaded, as would seem, in mitigation of damages. It was intimated in the case of *Stockwell v. Byrne*, 22 Ind. 6, that such an answer might be good. But in the more recent case of *Sammons v. Newman*, 27 Ind. 508, the court say "there is no warrant for such a pleading in such a case." We need not decide this question of pleading.

The appellants could, beyond question, have given the matter thus pleaded in evidence on the assessment of damages. We have in our reports a great variety of cases holding that where a demurrer has been erroneously sustained to a good paragraph of answer, where the matter pleaded could have been given in evidence under the general denial or other paragraphs of the answer, the error will be regarded as harmless. Among such cases the following may be cited. *Elliott v. Wright*, 7 Ind. 374; *Snyder v. White*, 15 Ind. 101; *Vaughn v. Cushing*, 23 Ind. 184; *The City of Logansport v. Wright*, 25 Ind. 512.

We have been referred to the case of *Catlett v. Gilbert*, 23 Ind. 614, as sustaining a different doctrine. That was an action to recover possession of real estate. The general denial had been pleaded, together with a special paragraph. A demurrer was sustained to the special paragraph of the answer. On trial of the issue, there was a finding and judgment for the plaintiff. The judgment was reversed for error in sustaining the demurrer to the second paragraph of the answer, although the matter pleaded could have been given in evidence under the general denial. It may be presumed, as the point is not mentioned in the opinion, that the attention of the court may not have been called to the statute allowing all matters of defence to be given in evidence under

 Gillaspie v. Kelley.

the general denial in such actions, or that it was an inadvertence merely. Be that as it may, we cannot allow that case to overturn the numerous authorities on this point.

Now, where matter can be given in evidence by the defendant in an action, on the assessment of damages, in mitigation thereof, no pleading by him is needed; and, assuming that the matter in mitigation could be pleaded, still an error in sustaining a demurrer to such pleading would be harmless, inasmuch as the matter can be given in evidence without the pleading. Such case stands upon precisely the same ground as those where the matter pleaded could be given in evidence under some other pleading.

The judgment below is affirmed, with costs.

A. Iglehart and J. E. Iglehart, for appellants.

A. L. Robinson and J. S. Buchanan, for appellees.

 GILLASPIE v. KELLEY.

PROMISSORY NOTE.—*Blank.*—The execution of a note, on its face payable at a bank, the place for the name of which is left blank, at a town named, authorizes the payee, before the maturity of the note, to insert the name of a particular bank at such town in the blank space, so that, whatever limitation of authority may have been imposed by the maker on the payee, the note will be negotiable and governed by the law merchant in the hands of a *bona fide* indorsee.

APPEAL from the Clinton Common Pleas.

BUSKIRK, J.—It is alleged in the complaint that the appellee, James Kelley, on the 25th day of November, 1869, executed his certain promissory note to one Thomas H. Tobin, whereby he, for value, then and thereby received by him, promised to pay to the said Thomas H. Tobin or bearer, ten months after the date last aforesaid, the sum of one hundred dollars, with ten per cent. interest thereon from the date

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aforesaid, without relief from the valuation or appraisement laws, payable at Carter, Given & Co.'s Bank, at Frankfort; a copy of which note, with indorsements, was filed with complaint; that afterward, on the day and date last aforesaid, the said Tobin sold and assigned said note, by indorsement in writing thereon, to Isaac Cook and Henry M. Baum, by their firm name of Cook & Baum, who, by the same firm name, sold and indorsed the said note in writing thereon to the plaintiff, who is now the *bona fide* owner, holder, and bearer of the same; that the said note is wholly due and unpaid. The prayer of the complaint was for judgment for one hundred and fifty dollars.

The defendant answered by the general denial, under oath.

The cause was, by agreement, submitted to the court for trial, and resulted in a finding for the defendant.

The plaintiff moved the court for a new trial, but the motion was overruled, and the plaintiff excepted.

The plaintiff appeals, and assigns for error the overruling of the motion for a new trial.

The first reason assigned for a new trial is, that the finding is not supported by the evidence. The evidence is in the record. There is not much conflict in the testimony of the several witnesses. The defendant was examined as a witness on behalf of the plaintiff. He admitted that he signed the note, but insisted that the note had been changed after he had executed it. Several other witnesses were examined in reference to the alleged alteration, and in our opinion, it is shown by a preponderance of the evidence, that when the note was executed the name of the bank was in blank, and that after its execution the words "Carter, Given & Co." were inserted. The note read when executed, "payable at—— bank, at Frankfort." It now reads, "payable at Carter, Given & Co.'s Bank, at Frankfort."

The question presented for our decision is, whether the alteration is so material as to affect the validity of the note. The solution of the question depends upon whether the note as it was when executed was commercial paper. If

Gillaspie v. Kelley.

it was not, and the alteration gave it the character and immunity accorded to such paper, then such alteration was material, and renders the note void, unless the payee of the note was authorized to fill the blank which was in the note when it was delivered.

It is provided by section 6 of an act concerning promissory notes, bills of exchange, and other instruments, etc., approved March 11th, 1861, that "notes payable to order or bearer in a bank in this State, shall be negotiable as inland bills of exchange, and the payees and indorsees thereof may recover as in case of such bills." 2 G. & H. 658.

In this State, promissory notes payable in a bank in this State, only, are placed upon the footing of bills of exchange, and governed by the law merchant. *Hunt v. Standart*, 15 Ind. 33.

The bank in which a promissory note is payable should be named in the note, so that the maker can know where he can pay the same upon maturity, and that a demand may be made whenever such demand is necessary. *Edwards Bills*, 157. The note in the case in judgment, when it was signed by the maker, and by him delivered to the payee, did not contain the name of the bank where it was payable, and consequently was not governed by the law merchant. The insertion of the name of the bank in Frankfort, where the same was payable, was a material alteration, and rendered the note void unless the payee was authorized to fill the blank by inserting the name of the bank. *Woodworth v. Bank of America*, 19 Johns. 391; *Clute v. Small*, 17 Wend. 238; *Nazro v. Fuller*, 24 Wend. 374.

We proceed to inquire whether the payee of a negotiable promissory note is authorized to insert the name of the bank where the same has been left blank.

The maker of a promissory note stands upon the footing of an acceptor of a bill of exchange. *Nazro v. Fuller*, 24 Wend. 374; *Chitty Bills*, 100-103; *Byles Bills*, 173-177.

In our opinion, the rule is well settled, that if a person indorses or signs in blank paper or a note and intrusts it to

another that he may raise money upon it, he authorizes that other person to fill all blanks which are necessary and proper to make the instrument a perfect and complete bill of exchange or promissory note, as the case may be. *Holland v. Hatch*, 11 Ind. 497; *Spitler v. James*, 32 Ind. 202, and the authorities there cited. It is quite obvious to us, not only from the face of the note, but from the evidence of the appellee, that the maker of the note in question intended to make the same negotiable and governed by the law merchant. If the parties had intended to make an ordinary promissory note, and it had been complete as such when it was delivered to the payee, such payee would not have been authorized to insert words rendering it negotiable; and if there had been no blank in the note, and such words had been interlined, such interlineation would have put a purchaser upon inquiry. The note, when delivered, was not perfect and complete as a negotiable instrument governed by the law merchant. The payee had the right to make it perfect and complete by inserting the name of the bank where it was to be payable.

The case of *Spitler v. James*, *supra*, is very similar to the one under consideration, and is much in point. In that case the court say: "In this case, it was proper, to complete the note and render it negotiable by the law merchant, to make it payable at a bank. There was sufficient space for that purpose, and whatever question there may have been, while the note remained in the hands of a party having notice of the limitation on the authority of the maker imposed by the indorser, no defence can be based upon such limitation when the paper has passed into the hands of a *bona fide* holder.

"The principle which excludes defences against instruments negotiable by the law merchant, in the hands of a purchaser before due, for value, and without notice of defects, would be violated by every exception introduced, and the value of such securities greatly lessened in the market."

In the case in judgment, the note was transferred by the payee before its maturity, in good faith, and for a valuable

Goetz v. The State.

consideration. The signature of the maker was genuine. The note was in the usual form, and was perfect and complete on its face at the time when it was negotiated. It was in the possession of the payee, and the entire transaction was according to the ordinary and usual course of business. The appellee, being a *bona fide* holder, will be protected.

We are very clearly of the opinion that the finding was not supported by the evidence, and that the court erred in overruling the motion for a new trial.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to grant a new trial, and for further proceedings in accordance with this opinion.

J. N. Sims, for appellant.

L. McClurg, for appellee.

GOETZ v. THE STATE.

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LIQUOR LAW.—Sale to Minor.—Burden of Proof.—Under the statute imposing a fine upon one selling intoxicating liquor to a minor, a sale to a minor under the belief, entertained by the seller in good faith, that the minor is an adult, is not within the statute, but the burden of proof is on the seller to show in defence such facts as will justify the inference of such *bona fide* belief.

SAME.—That the minor told the seller he was twenty-one years of age, is not sufficient to justify such inference.

SAME.—Evidence that such minor had a beard simply, furnishes to the Supreme Court no means of judging as to the apparent age of the minor.

APPEAL from the Marion Criminal Court.

WORDEN, J.—The appellant was indicted in the court below for unlawfully selling intoxicating liquor to Frank Putnam, a minor. Trial by the court, conviction and judgment, a new trial being refused.

No question is made except as to the sufficiency of the evidence to sustain the conviction.

The following is the evidence as set out in the bill of exceptions. Frank Putnam, being sworn, testified as follows: "Reside corner of Circle and Meridian streets; I know defendant well. Witness says he will be twenty years old tomorrow. I have purchased liquor and drank it at defendant's saloon; sometimes cider, sometimes beer, and sometimes soda; before the 14th of November I bought whiskey there; I drank before I went before the grand jury; sometimes I paid for it, sometimes I didn't; defendant was always in the saloon; I was before the grand jury about a month before, the month of November; it was about three or four weeks before I went before the grand jury; I bought a drink, a half glass full; I paid ten cents for it; this was in Marion county, State of Indiana; defendant's place of business is under the Palmer House in this city; he is keeping saloon."

Cross examined: "I have a beard; I told defendant I was twenty-one years old; I told him that a long while ago, five or six months ago; I know defendant not very long, six or seven months only; I have shaved for about four months; shaved two years ago; quit until about four months, when I commenced again."

This was all the evidence in the cause. It is urged by counsel for the appellant that the evidence is wholly insufficient. It should be observed, in order to form a correct understanding of the evidence, that the indictment was returned on the 15th of November, 1872, with the name of Frank Putnam indorsed thereon as the State's witness, and that the trial took place on the 31st of December, 1872.

We are of opinion that we should not disturb the finding on the evidence. The witness bought whiskey at the defendant's saloon before the 14th of November, but of what year is not in terms stated; but the witness proceeds to state that it was three or four weeks before he went before the grand jury. We think it reasonable to infer that he had reference to the time of his being before the grand jury to testify to facts on which the present indictment was based.

Again, the witness testifies that the defendant was always in the saloon; and still further, that he had only been acquainted with the defendant six or seven months.

This renders it clear that the sale was within the time limited by the statute for the prosecution. The witness says he bought a drink, half glass full, and paid ten cents for it. The counsel for the appellant say, what he bought is not stated, and ask, was it soda, beer, or whiskey? We think the evidence shows it to have been whiskey, for that is the article of which the witness had just been speaking, as having been bought by him before the 14th of November.

The most important question in the case is, whether the defendant was acting in good faith, supposing the witness to have been an adult at the time he sold him the whiskey. A sale of intoxicating liquor to a minor under the belief, entertained in good faith, that he was an adult, is not within the statute. But the burthen of proof on this subject is on the defendant; and to make out this defence, such facts must be shown as will justify the inference of such *bona fide* belief. *Farbach v. The State*, 24 Ind. 77; *Rineman v. The State*, 24 Ind. 80.

There is little or nothing in the evidence showing that the defendant had reasonable ground to believe that the witness was an adult at the time the liquor was sold, except that the witness had previously told him so. This was clearly not sufficient.

The witness, it appears, had a "beard" at the time of the trial. How exuberant may have been its growth, or how extensive its field, does not appear. It may, perhaps, be reasonable to infer that it was of but slight growth and scanty proportions, since he had abandoned the enterprise of shaving, which he had commenced two years before, and had recommenced about four months only before the trial. Amongst the Roman youth the *toga virilis* was assumed in the sixteenth year, and amongst modern youth the evidence of virility afforded by a beard is frequently, to a greater or less extent, exhibited at quite as early a period in life. We

Dawson v. Byard.

have no means of judging as to the apparent age of the witness. We know from the evidence, assuming it to be true, that at the time of the trial he was, within a day, twenty years old; that he then had a beard, and that he had made efforts with the razor about two years before. Had his appearance as to age been such, or had there been such other circumstances as, in connection with his own statement to the defendant, might reasonably have imposed upon him and induced the honest belief that the witness was twenty-one, evidence thereof might have been, but was not, given.

The judgment below is affirmed, with costs.

J. S. Harvey and *F. J. Mattler*, for appellant.

J. C. Denny, Attorney General, for the State.

DAWSON v. BYARD.

PLEADING.—*Damages.—Contract.*—In an action by the seller for damages for a breach of a contract for the purchase of a certain number of hogs at a specified price, of a minimum weight, at a fixed time and place, where the complaint alleged that the plaintiff had the hogs at the place and time fixed, ready for delivery, and the defendant failed and refused to receive and pay for them; *Held*, after verdict and judgment for the plaintiff, that it was not necessary to further aver that the hogs were weighed and set apart for the defendant.

APPEAL from the Warren Common Pleas.

OSBORN, J.—This action was instituted by Byard, the appellee, against Dawson, the appellant. The complaint alleges that on the — day of September, 1870, the appellee sold to the appellant sixty head of fat hogs, to be delivered on a day named, at eight dollars per hundred pounds gross, each hog not weighing less than two hundred pounds; that he was ready with the hogs to comply with his part of the contract at the time mentioned for the delivery; that the appellant failed to receive and pay for them, but asked fur-

Dawson v. Byard.

ther time, which was granted, and the 13th day of December, 1870, was fixed and agreed upon as the time, and the appellee's farm as the place of delivery; that the appellant at different times paid on the contract sums of money. It then avers, that on the 16th day of December, 1870, he was ready at the place of delivery, his farm, with said sixty hogs, to comply with his part of the contract; that the appellant wholly failed and refused to receive and pay for them, according to his contract, to his damage one thousand dollars.

The defendant filed an answer of several paragraphs, and an issue of fact was formed. The issues were tried by a jury, and a verdict rendered for the plaintiff for two hundred and four dollars and eighty cents. Final judgment was rendered on the verdict.

The appellant assigns for error, that the complaint does not state facts sufficient to constitute a cause of action.

The objection urged against the complaint is, that by the terms of the contract, it was a condition precedent to any right of recovery by the appellee, that he should not only have the hogs ready for delivery to the appellant at the time and place specified and fixed by the contract, but that he must also have them weighed and set apart for him; that unless these facts are averred in the complaint, it is defective, and that the defect can be reached after verdict and judgment, on appeal.

We are referred to the following authorities to sustain the position: 10 Ind. 117. In that case, a demurrer was filed to an answer and sustained, and this court decided that the demurrer searched the record, and that it would reach the complaint. 12 Ind. 389. The action in that case was against the indorser of a promissory note, payable at a bank. The complaint failed to aver presentment for payment, protest, and notice, or any excuse for failure to do so. Without such demand, failure, and notice of non-payment, there was no liability. 24 Ind. 289. The action was upon a written instrument, and under the statute it is imperative that a

copy or the original instrument must be filed with the complaint. Without it, there is no cause of action.

On the other hand, it has been held, that if a good cause of action be stated in the complaint, though it be defectively stated, a general verdict will cure the defect (4 Blackf. 42), because it will be presumed that all circumstances, both in form and substance, necessary to complete the cause of action thus defectively stated, were proved at the trial. 3 Blackf. 104; 2 Blackf. 149.

In this case, it is said: "Where the undertaking is founded on a contract in which something is to be done by the plaintiff, on condition of which the defendant undertakes to pay, it is necessary for the plaintiff in his declaration to aver a performance or a readiness to perform on his part. But the want of such an averment in the declaration, must be taken advantage of by demurrer; or, if the judgment be by default, by motion in arrest." 27 Ind. 139; 17 Ind. 115.

We do not think the complaint liable to the objection urged against it. The action was not instituted to recover the price of the hogs, but damages for failing and refusing to receive and pay for them. The averment that he had the hogs at the place and time fixed in the contract, ready for delivery, and that the appellant failed and refused to receive and pay for them, is sufficient in an action to recover damages for such refusal. The refusal of the appellant to receive the hogs rendered it unnecessary for the appellee to weigh and set them apart. It would have been a useless labor. If the facts alleged entitled the appellee to any damages, the complaint was not subject to a demurrer. The amount was a question for the jury, and depended upon the evidence.

The authorities cited by appellant on this question are not applicable to an action like this.

The judgment of said Warren Court of Common Pleas is affirmed, with costs, and ten per cent. damages.

J. H. Brown and *J. M. Rabb*, for appellant.

J. McCabe, for appellee.

Johnson v. Pinegar.

JOHNSON v. PINEGAR.

PLEADING.—*Answer.*—*Infancy.*—*Statute of Limitations.*—Where a plaintiff in her complaint alleged that she was a minor, under the age of twenty-one years, and sued by her next friend;

Held, that an answer pleading simply the statute of limitations admitted her infancy, and was bad on demurrer.

APPEAL from the Warren Common Pleas.

OSBORN, J.—This suit was instituted by the appellee, by her next friend, Walter H. Coon, against the appellant, for seduction. The appellant filed an answer containing two paragraphs. The first alleged, "that more than two years had elapsed since the commission of the grievance, wrongs, and trespasses mentioned in the complaint, at the commencement of this suit, to wit, on the 9th day of January, 1871. He therefore says that said action is barred by the statute of limitations." The second contained a general denial. To the first paragraph of the answer the plaintiff demurred, on the ground that it did not state facts sufficient to constitute a bar to the complaint. The demurrer was sustained, and the defendant excepted. The cause was tried by a jury, and a verdict rendered for the plaintiff for five thousand dollars. Motion for a new trial overruled, exception taken, and final judgment on the verdict.

There is no bill of exceptions in the record, and the only error relied upon for a reversal of the judgment below is in sustaining the demurrer to the first paragraph of the answer.

The appellant insists that the paragraph is good; that it was not necessary for him to negative an exception to the statute; and that if the plaintiff desires to avoid the answer on the ground of infancy, she should have replied it. And we are referred to 7 Ind. 442, and authorities there cited, as sustaining his position.

Without controverting the rule stated, we think it is not applicable in this case. The complaint alleges that the plaintiff is a minor, under the age of twenty-one years, and she

sues by her next friend. The defendant does not in any manner question her right thus to prosecute her action, but files his answer and admits her infancy.

The appellant, in his brief, contends that the plaintiff was not bound to allege her infancy in her complaint, and that the "facts needlessly stated are not material parts of the complaint," that her infancy was not a material fact belonging to the complaint, and the answer setting up the statute was not a confession of them. If it is meant to be said that the infancy of the plaintiff was not a material part of the complaint, so far as the cause of action was concerned, the proposition is correct. The suit was instituted by next friend, and it was material that the complaint should show that the plaintiff was an infant, and formerly it must also be shown that the *prochein ami* had been admitted by the court. *Shirley v. Hagar*, 3 Blackf. 225; *Stanley v. Chappell*, 8 Cowen, 235; *Grantman v. Thrall*, 44 Barb. 173; *Hulbert v. Young*, 13 How. Pr. 413.

The allegation of infancy was legitimate, and it is not denied that, if true, it would avoid the statute. It did not affect the merits of the cause of action. Neither does the statute of limitations. It simply defeats the action by lapse of time. For the purpose of the statute, the answer admits the truth of the allegation of infancy in the complaint. To reply it would be but an idle ceremony. The ruling of the court on the demurrer was correct.

In an action by one as an infant, a plea to the merits admits the character in which the plaintiff sues. *Linville v. Earlywine*, 4 Blackf. 469; *The Rising Sun, etc., Turnpike Co. v. McCollum*, 7 Ind. 677.

What practice should be adopted when the allegation of the infancy of the plaintiff made in the complaint is not true, we do not indicate. That question is not presented in the record before us. In this case the defendant below admitted the infancy of the plaintiff by pleading to the merits. 4 Blackf. and 7 Ind., *supra*. And also by filing an affirmative answer and not denying the allegation of infancy alleged in the complaint.

Hamrick v. The Danville and North Salem Gravel Road Company.

The judgment of the said Warren Common Pleas is affirmed, with costs and two per cent. damages.

J. McCabe, for appellant.

HAMRICK v. THE DANVILLE AND NORTH SALEM GRAVEL
ROAD COMPANY.

PLEADING.—*Complaint.*—*Turnpike.*—Where, in an action on a subscription of stock to a gravel road company, the complaint alleges all the facts material, under the statute, of the organization of the company and subscriptions of stock, it is not insufficient because the copy of the articles of association filed with it shows only the name and amount subscribed by the defendant.

ASSIGNMENT OF ERROR.—An assignment of error, that the judgment should have been for the defendant instead of for the plaintiff is too general.

PRACTICE.—*Judgment.*—*Change of Venue.*—On change of venue, one court sent a cause to another, which improperly struck it from the docket, with costs against the plaintiff, remanding the cause to the former court; and thereupon the former court tried the cause, and upon appeal the Supreme Court reversed the judgment and ordered the cause back to the court to which the venue had been changed, for trial;

Held, that under said reversal and order, the said judgment for costs against the plaintiff was reversed, and a motion to tax said costs against him by reason of said judgment was correctly overruled.

Held, also, that a demurrer to an answer setting up said judgment striking the cause from the docket and for costs against plaintiff was correctly sustained.

APPEAL from the Putnam Common Pleas.

DOWNEY, J.—This was an action brought by the appellee against the appellant, to recover the amount of a subscription made by him to the capital stock of the company on its articles of association. The answer first filed need not be noticed. On the application of the defendant, the venue in the case was changed from the Hendricks Common Pleas, where the action was commenced, to the Putnam Common Pleas. The Putnam Common Pleas struck the cause from its docket, and remanded it to the Hendricks Common Pleas, on its own motion, and rendered judgment for costs, amounting to seventeen dollars and seventy cents, against the ap-

Hamrick v. The Danville and North Salem Gravel Road Company.

pellant. From this order the defendant appealed to this court; but it was held, that no appeal therefrom would lie. 30 Ind. 147. On the return of the cause to the Hendricks Common Pleas, there was judgment in favor of the plaintiff, from which the defendant again appealed to this court; and it was then held, that the action of the Putnam Common Pleas, in returning the cause to the Hendricks Common Pleas, was erroneous, and the judgment and proceedings, back to and including the action of the court in striking the cause from its docket, were reversed, and the cause was remanded, with directions to the Hendricks Common Pleas to send a transcript of its proceedings, with the papers of the cause, to the Putnam Common Pleas, and that the latter court proceed with the cause. 32 Ind. 347.

When the parties again appeared in the Putnam Common Pleas, the defendant moved the court to strike the cause from the docket, for the reason that the cause had been previously stricken from the docket, and judgment for costs rendered against the defendant, and that therefore the court had no jurisdiction of the cause. This motion was overruled by the court, and the defendant excepted. The defendant then withdrew his former answer and pleaded a substituted answer, in which he set up the same matter, in substance, as is contained in the said motion. The plaintiff demurred to this answer, on the ground that it did not state facts sufficient to constitute a defence to the action; the demurrer was sustained, and the defendant excepted. The defendant declining to amend his answer, the damages were assessed by the court, and final judgment was rendered for the plaintiff. The defendant then moved the court to tax against the plaintiff all the costs which accrued in said cause in the Putnam Common Pleas, up to and including the order of the said court striking the cause from the docket of that court, amounting to the sum of seventeen dollars and seventy cents. This motion was also overruled, and the defendant again excepted.

The errors assigned are the following: first, the insuffi-

Hamrick v. The Danville and North Salem Gravel Road Company.

ciency of the complaint; second, that the judgment should have been for the defendant, instead of being for the plaintiff; third, the overruling of the motion to strike the cause from the docket; fourth, sustaining the demurrer to the substituted answer; fifth, overruling the motion to tax the costs in the Putnam Common Pleas, prior to striking the cause from the docket, to the plaintiff; sixth, that the Putnam Common Pleas had no jurisdiction to render judgment in said cause.

The objection to the complaint relied upon in the brief is, that the copy of the articles of association filed with it shows a want of compliance with the statute, 1 G. & H. 474, sec. 1, because the names and amounts subscribed by others than the defendant are not appended to the copy filed, and it does not, therefore, appear that his name and the amount subscribed by him are not the only name and amount subscribed to the articles of association.

The complaint alleges that the articles of association had been subscribed by divers persons, among whom is the defendant; that more than five hundred dollars per mile of the contemplated road had been subscribed; that a copy of the articles of association had been duly and legally recorded in the office of the recorder of the county, a board of directors duly elected, the making of calls for the amounts subscribed, and the giving of due and legal notice thereof by publication, etc.

We think the objection urged against the complaint is not well founded.

There is a question here, which counsel do not make, and we mention it only as one of interest, and that is, whether the appellant can go behind the error for which the former judgment was reversed, in the assignment of errors on this appeal. If not, then the question as to the sufficiency of the complaint, which might have been raised on the former appeal, and which lies back of the point in the history of the cause to which it was before reversed, could not now be presented. But if it should not be allowed to be presented

Hamrick v. The Danville and North Salem Gravel Road Company.

on the second or subsequent appeal, how is the objection to be made? Must the former adjudication in this court be pleaded to the assignment of error? or does the question arise upon the record, where it shows, as the record in this case does, the former appeals and rulings?

The second assignment of error is too general. Such an assignment presents no question to this court. The assignment must specifically point out the error of which complaint is made. *Ruffing v. Tilton*, 12 Ind. 259; *Gallettley v. Barrackman*, 12 Ind. 379, and cases cited.

We are unable to see any error in overruling the motion to strike the case from the docket of the Putnam Common Pleas, or in sustaining the demurrer to the substituted answer, setting up the same facts. This court had ordered the cause to be sent to that court, where it was improperly stricken from the docket at a previous term. The court had jurisdiction of the subject-matter and of the parties.

There was no error in overruling the motion to tax the costs to the plaintiff which had accrued in the Putnam Common Pleas up to the time when the order was made striking the cause from the docket. The reversal of that order or judgment carried the costs against the plaintiff in the action from the making of the erroneous order, including the costs of such order. When the cause was again taken up in the lower court, it progressed from the point at which the error was committed; and the costs which had accrued up to that point in the case should abide the result of the action.

There is no ground for the sixth assignment of error. The court had full and complete jurisdiction of the cause.

The judgment is affirmed, with ten per cent. damages and costs.*

C. C. Nave and *C. A. Nave*, for appellant.

L. M. Campbell, for appellee.

*Petition for a rehearing overruled.

Estell v. The Knightstown and Middletown Turnpike Company.

ESTELL v. THE KNIGHTSTOWN AND MIDDLETOWN TURNPIKE
COMPANY.

TURNPIKE.—*Articles of Association.*—*Description of Route.*—Where the articles of association of a turnpike company describe the proposed road as beginning at a point where two roads, which are named, touch each other at a certain corner of a certain section, and the route is described so that its line can be traced to a certain point in a certain section and range, where it terminates, a failure to state the range of the section at the point of beginning will not render the description bad.

SAME.—*Calls for Stock.*—*Time of Payment.*—The power conferred upon the board of directors of a turnpike company to make calls for installments of stock subscribed was not intended to prevent stockholders, in their articles of association, or in any written promise to pay for stock, from fixing the time of payment, but was conferred to enable the company to call in and enforce payment, when no time is fixed in the contract itself. If the time of payment is fixed by the terms of the subscription, the party subscribing is bound thereby.

CORPORATION.—*Capacity to sue.*—Capacities to sue is one of the capacities of every corporation.

APPEAL from the Henry Circuit Court.

OSBORN, J.—The appellee sued the appellant to recover the amount of his subscription to its capital stock. He demurred to the complaint, on the ground that the appellee had not legal capacity to sue, and that it did not contain facts sufficient to constitute a cause of action. His demurrer was overruled, and he excepted to the ruling. He then answered, first, by denying that he executed the articles of association sued on, which was verified by his own affidavit; second, a general denial.

The cause was tried by the court, finding for the appellee, motion for a new trial overruled, exceptions, and final judgment against the appellant on the finding.

The grounds for a new trial were, that the finding of the court was not sustained by sufficient evidence, and that it was contrary to law; second, for error occurring at the trial and excepted to by him, stating it.

The errors assigned are, that the court erred in overruling the appellant's demurrer to the appellee's complaint; second, that the court erred in overruling his motion for a new trial.

Estell v. The Knightstown and Middletown Turnpike Company.

The finding of the court was sustained by the evidence, and the motion for a new trial was properly overruled. The evidence was conflicting, and it was the duty of the court to determine, between the witnesses; and we think, after an examination of the evidence, that the finding of the court was in accordance with the preponderance of the evidence.

The bill of exceptions does not show that any ruling of the court was excepted to during the trial. That point is not urged here.

The appellant relies upon the first error assigned for a reversal.

The complaint alleges that the appellee is a legally organized corporation; that on the 1st day of April, 1867, he (the appellant) subscribed the articles of association of the company, and agreed thereon to pay the company, as provided for, and at the times, in the said articles of association specified, the amount of capital stock of the company subscribed by and set opposite to his name thereon, to wit, two hundred dollars. A copy of the articles was filed with, and made a part of, the complaint. It also alleges that afterward, on the 24th of the same April, a copy of the articles was duly filed and recorded in the recorder's office of Henry county, whereby the plaintiff became a legally organized corporation under and in pursuance of the articles of association; that at the time of such filing, more than five thousand dollars of valid stock had been subscribed to the articles, and that they have ever since been, and now are, such legally organized corporation; that the defendant paid on his subscription thirty-four dollars, and that the residue thereof is due and unpaid.

The following is a copy of the articles of association:

"ARTICLES OF ASSOCIATION.

"APRIL 1st, A. D., 1867.

"We, whose names are hereunto attached, having determined to construct a turnpike or gravel road from the points and through the lands hereinafter named, do therefore organize ourselves into a corporation as follows: The said corpo-

Estell v. The Knightstown and Middletown Turnpike Company.

ration shall be known as The Knightstown and Middletown Turnpike Company. The said road shall commence where the road leading from Green's Corner to Knightstown strikes the Knightstown and Warrington turnpike, at or near the south-west corner of section number sixteen (16), township number sixteen (16), and running thence along the section line, or near what is known as the Knightstown and Middletown state road, through township number sixteen (16) and Greensboro township, to the line dividing Harrison and Greensboro townships, to a place known as Woodville, at or near the middle of section nineteen, in Greensboro township; thence west along the township line to the north-west corner of the aforesaid section number nineteen, known as the lands of Levi Ricks; running thence north along the township road on the east side of section thirteen, range eight east, township seventeen, to the terminus in township eighteen (18), in section number thirty-six, range eight east, or where the township road strikes the Pendleton and New Castle state road, making ten miles in length. The capital of said association shall be ten thousand dollars, and shall be divided into four hundred shares of twenty-five dollars (\$25.00) each, and shall be paid in eight (8) equal payments quarterly, commencing June 1st, A. D., 1867."

The appellant's name appears as one of the subscribers to the articles for eight shares.

The first objection to the complaint is, that it does not describe the line of the route, and the place to and from which it was proposed to construct the road; that it does not state what range the section sixteen mentioned as the point of beginning is in. It states that it shall commence where the road leading from Green's Corner strikes the Knightstown and Warrington turnpike, at or near the south-west corner of section sixteen, in township sixteen. It then runs along the section line, or near a certain road, naming it, to a place known as Woodville, at or near the middle of section nineteen; thence west to the north-west corner of that section; thence running north on the town-

ship road on the east side of section thirteen, range eight east, in township seventeen; thence to the terminus in section thirty-six, township eighteen, range eight east. The last two points named, being in range eight, enable us to fix the first one in range nine, with just as much certainty as if it had been specifically mentioned. We are thus enabled to say that the line of the route is northerly until it strikes about the middle of the east and west line on the north side of section nineteen, because it runs from that point west to the north-west corner of the section; and we also know that that section is in range nine and township seventeen, because the line is to run from thence north on the east side of section thirteen, range eight, in that township, and we know that the line running north on the east side of that section thirteen is the prolongation of the same line from the north-west corner of the section nineteen mentioned, and thus it is rendered certain that the section sixteen must be in range nine east, and that the route of the proposed road is in a northerly direction.

And besides, the road is to commence where one road strikes another, at or near the south-west corner of section sixteen; thence to run along the section line, or near a road named. The place where the two roads touched was the starting point, and the line was to be near the line of a road also named, and to places manifestly well known; that line and those places would control the description by section and congressional township lines. The word "township" was used by mistake instead of "section," in describing the line as running west from the middle of section nineteen, to the north-west corner of that section. No one could be mistaken about, or misled by it. We think the line of the route was sufficiently certain to enable any one to locate or find it.

It is also objected that it does not appear that the line of the route of the proposed road was in Henry county. What we have already said shows that it was in that county. All of townships sixteen, seventeen, eighteen, and as far north

Estell v. The Knightstown and Middletown Turnpike Company.

as section twenty-five in nineteen, of range nine, and the eastern tier of sections in range eight, are in Henry county.

Another objection urged against the complaint is, that there is no averment of a performance of all the requirements of the statute and the organization of the company by the election of a board of directors, and we are referred to *The Covington, etc., Co. v. Moore*, 3 Ind. 510, to show that directors must be elected before stock can be collected. On examining that case, it will be seen that the court held that "a valid corporation and binding subscription of stock may exist without there being directors to the corporation" under the statute, and the judge who delivered the opinion of the court said, "and instalments of stock must be called for by the directors," and he added, "there must, therefore, be directors before subscriptions of stock can be collected." In *The New Albany and Salem Railroad Co. v. Pickens*, 5 Ind. 247, the complaint did not aver that the directors made any call for instalments. It simply stated that eleven instalments were due and payable. The charter of that company authorized the directors to "demand at such time and in such proportion as they shall see fit, the sums of money due by stockholders on their respective money subscriptions of stock," etc.

The subscription sued on in that case, as in this, fixed the time for the payments. The court, on page 249, in reference to the authority conferred upon the directors to make calls for instalments, says: "This provision confers upon the corporation power to demand money due by stockholders at such time, etc., as the company shall see fit; but in this case, the contract itself, in point of law, dispenses with the necessity of such demand."

The authority conferred upon the board of directors, by section 11 of the act under which the appellee was organized, was not intended to prevent the stockholders of the company, in their articles of organization or any written promise to pay for stock, from fixing the time of payment,

Estell v. The Knightstown and Middletown Turnpike Company.

but to enable the company to call in and enforce payment where no time was fixed in the contract itself. If the promise of the stockholder fixes the time of payment, that dispenses with the necessity of exercising the power conferred upon the directors to make the call and fix the time. There is nothing in the statute prohibiting such a contract. Having made it, we know of no reason why he should not be bound by it.

This question was decided in *Vansickle v. Erdelmeyer*, 36 Ind. 262. In that case, the amounts subscribed were payable in payments at one, two, and three years, commencing with the year 1868, in money or labor, and at such time in said years as the directors might determine. An injunction was asked, to enjoin the collection of assessments by the treasurer of the county, on the ground that the articles of association of the company were illegal, because the amount was payable in labor. On page 263, it is said: "The amounts to be raised by assessments are payable in three or more yearly payments, and there would seem to be, at least, no impropriety in making the subscriptions payable in the same way."

The authorities cited by the appellant, to show that a subscription to pay upon condition is void, are not applicable. There was no condition annexed to the subscription. It was an absolute promise to pay; and the fact that the time of payment was fixed and made definite cannot be construed into a condition. Whether the company could, under section 16, require the payment at an earlier time, is not before us.

The complaint shows that in the articles of association a name was assumed; that the line of the route, etc., of the road, the amount of capital stock and the number of shares into which it was divided, the names, etc., of the subscribers, and the amount taken by each, were set forth. It also shows that the requisite amount of stock was subscribed, and that a copy of the articles of association was filed in the recorder's office of the proper county; and the law declares, "that

Pauley v. Short.

from that time the company shall be a corporation, known by the name assumed in the articles of association." It had legal capacity to sue. That is one of the capacities of every corporation.

The judgment of the said Henry Circuit Court is affirmed.

J. T. Elliott, M. E. Forkner, and E. H. Bundy, for appellant.

T. B. Redding, J. Brown, and R. L. Polk, for appellee.

PAULEY v. SHORT.

PRACTICE.—Pleading.—Evidence.—Where, in an action on account for goods sold, the defendant answered payment, to which the plaintiff replied the general denial;

Held, that the defendant could not, on the trial, claim to be surprised by the testimony of plaintiff that certain payments made were upon other than the account sued on.

APPEAL from the Vanderburg Common Pleas.

WORDEN, J.—This was an action by the appellee against the appellant for beef and pork sold and delivered by the plaintiff to the defendant. Issue, trial by jury, verdict and judgment for plaintiff.

There is no question before us, except that which arises on the evidence. On the trial, the defendant admitted the plaintiff's account, and based his defence on the ground of payment. He gave in evidence several receipts, given him by the plaintiff for money received "on account;" but the plaintiff testified that some of the receipts were given on different accounts from that sued upon. This, the defendant claims, took him by surprise. The defendant had pleaded payment, and the plaintiff had replied in denial. We think the defendant might, in the exercise of reasonable diligence, have anticipated that the plaintiff would contest

Sturm v. Potter.

the application of the payments made to the account sued upon.

The evidence sustains the verdict and judgment, and there is no ground upon which a new trial should have been granted.

The judgment below is affirmed, with costs and six per cent. damages.

W. F. Pidgeon, for appellant.

J. S. Pritchett and *G. G. Reily*, for appellee.

STURM v. POTTER.

CRIMINAL LAW.—*Justice of the Peace.*—*Constable.*—*Jurisdiction.*—*Fugitive.*
Arrest.—*Warrant.*—A warrant issued by a justice of the peace for the arrest of a person duly charged before him with the commission of a crime or misdemeanor, and who has left the county in which the offence was committed, and where the warrant was issued, may be served by a constable of said county in any other county where the defendant may be found, upon attaching a certificate of the clerk of the said county where such warrant was issued, setting forth that the justice signing the warrant is duly commissioned and qualified as such, and that his signature is genuine.

APPEAL from the Marion Superior Court.

PETTIT, C. J.—The following opinion of the court below, delivered by Judge Rand, fully explains and covers every question in the case, and we adopt, approve of, and make it our opinion:

“Frederic C. Sturm filed his petition in this court, alleging that William J. Potter is unlawfully restraining him of his liberty, and praying for a writ of *habeas corpus*. The writ was issued and returned, and Potter says, in his return, that he holds said Sturm by virtue of a writ issued by a justice of the peace of Decatur county to him as special constable of said county, directing him to arrest said Sturm and bring

Sturm v. Potter.

him forthwith before said justice to answer to a charge of obtaining goods under false pretences in Decatur county. The writ and the affidavit on which it was issued, and the clerk of Decatur county's certificate of the genuineness of the writ issued by the justice are made part of the return. Exceptions were filed to the return, which were overruled and excepted to, and a denial of the return to the writ of *habeas corpus* was filed. The cause was heard at special term, and Sturm was remanded to the custody of Potter. From this judgment Sturm has appealed to general term. The only question raised is as to the sufficiency of the return to the writ of *habeas corpus*. It is contended that a constable of Decatur cannot execute a writ in Marion county, issued to him by a justice of the peace for Decatur county, commanding him to arrest a person charged with a crime in Decatur county. Section 8 of an act prescribing the number, and defining the powers and duties, of constables, approved May 27th, 1852 (2 G. & H. 621), reads as follows: 'In executing a warrant for the apprehension of any fugitive from justice, who has fled into another county, from any county in the State, a constable may arrest such offender in any county where he may be found; but if such offender shall request it, he shall not remove him from such county, without taking him before some officer authorized to issue and try writs of *habeas corpus*, and giving such offender time to make application for such writ.' This would seem to confer ample authority on a constable of one county, where he has a proper writ charging a criminal offence committed in such county, to follow the alleged culprit into any other county in the State, and arrest him and take him before the justice who issued the writ, first giving him an opportunity to apply for a writ of *habeas corpus*, if he desires so to do. The second section of the justice's act, as amended December 2d, 1865 (3 Ind. Stat. 319), reads as follows: 'Any justice shall, on complaint made on oath before him, charging any person with the commission of a crime or misdemeanor, issue his warrant for the arrest of such person, and cause him to be

brought forthwith before him for trial or examination, and such warrant may be served throughout the county; and where the defendant has escaped from the county in which the offence was committed, upon attaching a certificate of the clerk of the county, setting forth that the justice signing the warrant is duly commissioned and qualified as such, and that his signature is genuine, the same may be served by any constable or sheriff in any county in which the defendant may be found.' It is argued that this section only authorizes a constable or sheriff of the county to which the fugitive has fled to make the arrest. We cannot concur in this view. We think a proper construction of this section authorizes a constable or sheriff of the county in which the offence was committed to arrest the fugitive in any county where he may be found, by virtue of a warrant issued by a justice of the peace in the county where the offence was committed. The warrant in this case was issued to Potter as special constable of Decatur county. It certainly could not have been contemplated by the legislature that this warrant should be transferred to a constable of Marion county, or that it should be returned to the justice and a new one be issued to Marion county, and if, in the mean time, he had slipped into an adjoining county, a new warrant should be obtained, directed to a constable of that county. This construction would give an adroit fugitive all the chances of escape he would desire. We think that when he found that Sturm had fled from Decatur county, he had a right to get the clerk's certificate attached to the warrant, and then pursue and arrest the fugitive in any county in the State. Under this view, the two sections work harmoniously together. We have been referred to an act concerning fugitives from justice, approved May 27th, 1852, 2 G. & H. 434, but we think it is in no way conflicting with the section we have referred to. It provides for proceedings, in a county where a fugitive may be found, for his arrest and return to the county where the crime was committed. This is another means by which fugitives may be arrested and returned. In

Cartright v. Briggs.

the case at bar, the parties have adopted another course, and one, we think, equally legal. The judgment remanding the petitioner at special term is affirmed."

The judgment of the court below, in general term, is, in all things, affirmed, at the costs of the appellant.

W. W. Leathers, C. H. Test, D. V. Burns, and G. S. Wright, for appellant.

J. S. Scobey and O. B. Scobey, for appellee.

CARTRIGHT v. BRIGGS.

VENDOR AND⁴ PURCHASER.—*Defence to Action for Purchase-Money.—Failure of Title.*—In the absence of covenants and fraud, a failure of title is no defence to an action for the purchase-money of real estate.

SAME.—*Injunction.*—A purchaser of land sold as school land, while he is in the undisturbed possession thereof, cannot enjoin the auditor of the county from selling the land under a mortgage to secure the purchase-money, on the ground that the title to the land was not in the inhabitants of the county.

APPEAL from the Sullivan Circuit Court.

WORDEN, J.—Action by appellant against appellee. Demurrer to complaint sustained; exception; and final judgment for the defendant.

The error assigned questions the correctness of the ruling on the demurrer.

The complaint contains two paragraphs, but they are not essentially dissimilar. The following are the substantial facts briefly stated. In 1839, the school commissioners of Sullivan county sold to one Henry Rotramel, forty acres of land in section sixteen, in one of the townships of that county, supposed to be school land, the purchaser paying a part of the purchase-money, and taking a certificate of purchase, which he afterward assigned to the plaintiff. The plaintiff also pur-

41	184
141	366
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159	411

chased another forty-acre tract of the school commissioners, in the same section. Afterward, the auditor of the county made deeds to the plaintiff of the land, and took from him the usual school-fund mortgage to secure the payment of the unpaid purchase-money and the interest thereon. The plaintiff took, and still retains, possession of the land, and has made lasting and valuable improvements thereon. But it is alleged that the title to the land was not in the inhabitants of the township, but on the contrary, that another section had been set apart to the inhabitants of that township for school purposes, instead of section sixteen, and that section sixteen had been granted to the State of Indiana for the extension of the Wabash and Erie Canal.

It is alleged that the defendant, the auditor of the county, is about to sell the land under the mortgage, to make the unpaid purchase-money and interest. Prayer that he be enjoined until the plaintiff's title shall be made good.

We are of opinion that the demurrer was correctly sustained. There are several substantial reasons why the collection of the unpaid purchase-money and interest, by a sale of the premises, should not be enjoined. In the first place, there are no covenants broken, nor is any fraud alleged. In the case of *Laughery v. McLean*, 14 Ind. 106, it was held that in the absence of covenants and fraud, a failure of title was no defence to an action for purchase-money. This case has been approved and followed in many others since. We cite the following: *The Terre Haute, etc., R. R. Co. v. Norman*, 22 Ind. 63; *Coleman v. Hart*, 25 Ind. 256; *Starkey v. Neese*, 30 Ind. 222; *James v. Hays*, 34 Ind. 272.

In this case, however, there is no attempt being made to hold the plaintiff personally liable for the residue of the purchase-money and interest, but only to subject the land to the payment thereof. If the inhabitants of the township had no title, and if the plaintiff has none, we do not see how a sale of the land under the mortgage could injure the plaintiff. He has just such title as the inhabitants of the township had, and he mortgaged back just such title as he re-

Dodge *et al.* v. Dunham.

ceived. If nothing passed to him by his deeds, and if he mortgaged nothing, then nothing would pass to a purchaser under the mortgage, and he could not be hurt by such sale. It is held that in a suit to foreclose a mortgage given for purchase-money, want of title in the vendor is no defence to the foreclosure. *Hubbard v. Chappel*, 14 Ind. 601; *Hume v. Dessar*, 29 Ind. 112; *Rogers v. Place*, 29 Ind. 577; *Hanna v. Shields*, 34 Ind. 84.

Besides all this, the plaintiff is in the quiet and undisturbed possession of the premises. This possession may ripen, if it has not already, into a perfect title. The statute of limitations runs against the State. 2 G. & H. 164, sec. 224.

Even had there been a covenant of seizin in the plaintiff's deeds, he could only have recovered nominal damages thereon until he was evicted. See cases cited in *Hanna v. Shields*, *supra*.

The judgment below is affirmed, with costs.

J. C. Denny, *G. G. Reily*, and *W. C. Johnson*, for appellant.

J. M. Allen, *W. Mack*, *W. H. Duncan*, and *S. Coulson*, for appellee.

DODGE ET AL. v. DUNHAM.

SUPREME COURT.—*Assignment of Error*.—A general assignment of error in overruling a motion for a new trial is all that is necessary to bring to the attention of the Supreme Court whatever grounds appear in the motion and the accompanying bill of exceptions, and a re-statement of them is unnecessary.

PLEADING.—*Promissory Note*.—*Assignee*.—*Set-Off*.—*Counter-Claim*.—*Reply*.—

In a suit brought by the assignee of a promissory note against the maker, if the maker answer by way of set-off or counter-claim against the payee, the assignee may reply, setting up a claim of the payee against the maker, and thereby show that there is in fact no defence to the note.

SAME.—Set-Off.—Principal and Surety.—Where one of several makers of a promissory note files a set-off in his favor, he should allege that he is principal and that the other makers are only sureties; and in the absence of such allegations, it is not error to refuse to allow the set-off.

EVIDENCE.—Order of Introduction of.—Neither party is bound to anticipate the evidence of the other; and until the party having the burden of the issue has introduced evidence in support of such issue, it is unnecessary for the other to introduce evidence to defeat it. After that, it is his privilege to do so, and the other may close with rebutting evidence.

SAME.—Where no evidence in support of a set-off is admissible under the allegations of the pleadings, it is not error to reject evidence offered by the defendant to rebut evidence given by the plaintiff in support of affirmative matter set up in reply to the set-off of the defendant.

SAME.—Reiteration.—It is not error to refuse to permit a witness to reiterate a statement.

CONTRACT.—Construction.—Where it is represented and guaranteed, that a stock of goods will inventory, at "wholesale prices," a certain sum, the language will be taken to mean the wholesale prices at which they were purchased, and not the value that may be put upon them at the time the representation and guaranty are made.

PRINCIPAL AND SURETY.—Statute Construed.—The statute (sec. 674, 2 G. & H. 308) in reference to sureties contemplates a written complaint by the surety, in the nature of a cross complaint against the principal, and pleadings, issue, and trial thereon, the same as upon any other cross complaint; but these proceedings should not affect the proceedings of the plaintiff.

SAME.—Practice.—Motion for New Trial.—Though not in the form of a cross complaint, if the surety sets up that he is only surety, and his co-defendant goes to trial without objection, and submits the issue to a jury, and does not afterward raise objection to the form or manner of making the issue of suretyship, but joins in asking for a new trial, because the jury has not found upon that issue, the motion should be sustained as between the defendants.

SAME.—Issues joined between defendants upon a question of suretyship may be tried at, before, or after, the trial of the cause, or even at a subsequent term.

APPEAL from the Elkhart Common Pleas.

OSBORN, J.—The appellee sued the appellants upon a promissory note executed by them, payable to one Stephen S. Millspaugh, for five hundred dollars, and by Millspaugh indorsed to the appellee.

The appellant Dodge filed a separate answer of six paragraphs:

First. The general denial.

Second. That the appellee was not the real owner of the

Dodge et al. v. Dunham.

note, that he had not the legal or equitable title thereto, and that Millspaugh was the legal and equitable owner of it.

Third. A set-off, of various items, amounting in the aggregate to five hundred and thirty-eight dollars and fifty-six cents.

Fourth. That the note was executed in part payment for a stock of goods, when a part of the goods sold did not belong to Millspaugh, but to Ball & Co.; that Millspaugh knew they did not belong to him; that he represented to Dodge that he owned them, and had good right to sell the same; that Ball brought an action against him for his goods, and he had to pay for them forty-five dollars.

Fifth. That prior to the execution of the note in suit, Millspaugh was indebted to him; that he held a mortgage upon a stock of goods to secure his debt. Being about to enforce his claim under the mortgage, Millspaugh represented and warranted to him that the stock of goods would inventory, at wholesale prices, five thousand nine hundred dollars; that relying upon such representations he agreed to surrender his obligations against Millspaugh, and pay him one thousand dollars in addition, and take the stock of goods and become the owner thereof, and sell the same out at private sale; that in pursuance of said agreement, and relying upon those representations, he did surrender his notes and mortgage, and executed his two notes of five hundred dollars each, one due in three, and the other in four months, and took possession of the goods and inventories thereof; that the goods only inventoried, at wholesale prices, three thousand nine hundred dollars; that he only agreed to take said goods and execute said notes because of said representations and to assist Millspaugh and save to him the said one thousand dollars, and not because he desired to purchase the goods and engage in the sale of them as a business; that the note mentioned in the complaint was one of the notes given in the consummation of the said arrangement, and that he realized on the sale of the goods two thousand seven

hundred dollars; wherefore the said note was without consideration.

Sixth. That there was a defect of parties defendants, in that the said note sued on was not assigned by endorsement thereon, or by writing thereto attached, by Millspaugh, the payee, and the said Millspaugh was not a party defendant in the action.

The record shows that Cown also filed an answer of two paragraphs:

First. That he affixed his signature to the note as a surety, and not as a maker.

Second. That the appellant was not the real owner of the note, but that Millspaugh was; and he prayed that the suit might abate.

The appellee moved the court to strike out the fourth and fifth paragraphs of Dodge's answer; which was overruled, and he excepted.

He then filed his reply of general denial to the second, third, fourth, fifth, and sixth paragraphs of Dodge's answer, and a partial reply to the third and fourth paragraphs, by alleging that at that time, and prior to the commencement of the suit and the filing of the answer, Dodge was indebted to Millspaugh upon an account, a bill of particulars of which was filed, which he agreed with Millspaugh to allow and credit upon his said claim of set-off and counter-claim. To which reply Dodge filed a demurrer, on the ground that it did not contain facts sufficient to constitute a reply to the third and fourth paragraphs of his answer. The demurrer was overruled, and Dodge excepted.

There was a jury trial, which resulted in a verdict for the plaintiff for four hundred and thirty dollars.

The defendants, each for himself, moved the court for a new trial, on the grounds that the damages were excessive; that the verdict was not sustained by sufficient evidence; that it was contrary to law; that errors of "law occurred at the trial, excepted to at the time by the defendants, and each of them," stating what the errors were. The motion

Dodge et al. v. Dunham.

was overruled; the defendants excepted; and final judgment was rendered on the verdict.

The errors assigned are, first, in overruling the demurrer to the second paragraph of the reply; second, in overruling their motion for a new trial.

In this assignment the appellants state and number each of the acts and omissions of the court which were supposed to be erroneous. The general assignment of error, in overruling the motion for a new trial, was all that was necessary. Whatever grounds appeared in the motion and the bill of exceptions would be brought to the notice of the court by such an assignment. A re-statement of them was entirely unnecessary.

The appellants rely upon *Blew v. Hoover*, 30 Ind. 450, to sustain the first assignment of error. *Curran v. Curran*, 40 Ind. 473, overrules that and many other cases, on the ground that "a set-off is simply a cross demand made by the party pleading upon the opposite party; it is totally unconnected with the matter to which it is answered or replied, and in no way resembles the special pleas in bar as they existed at common law;" that "a set-off is not strictly a defence, and that from its very nature, it can only be regarded as an answer to so much of the plaintiff's demand as may be proved on the trial." But it in no manner impairs or overrules the cases holding that a plea in bar, constituting a defence, which assumes to answer the whole cause of action, but only answers a part, is bad on demurrer. The reply alleges that Dodge had agreed to credit the demand on his said claim of set-off and counter-claim.

They also insist that the plaintiff ought not to be permitted to set off a claim of Millspaugh against Dodge to Dodge's set-off against Millspaugh, because, to allow him "the benefit of a debt belonging to a third party is an anomaly, and can have no foundation except in positive law."

The statute provides (2 G. & H. 658, sec. 3), that whatever defence or set-off the maker of an assigned note had,

before notice of the assignment, against an assignor, or against the original payee, he shall have also against their assignees. That allows the same defence to be made against the note in the hands of an assignee that could have been made if it was in the hands of any assignor, if the defence accrued before notice of the assignment. But if we adopt the views of the appellants, we give to the maker a defence against the assignee that could not be made against the payee. It seems to be admitted that the reply would have been good as against the payee of the note. To sustain the reply, is not to give the assignee the benefit of a debt of a third party. It is only permitting him to use a claim of the payee to settle and adjust a claim of the maker against him, and thereby show that there is, in fact, no defence to the note.

In the case of *Turner v. Simpson*, 12 Ind. 413, it was held that when, in an action on a note, the maker pleaded a set-off, the plaintiff had a right, in order to meet that set-off, to show an indebtedness from the maker to him, as a defence to the set-off.

The reply was good, and there was no error in overruling the demurrer to it.

The appellants also claim that the judgment ought to be reversed, on account of the error of the court below in overruling their motion for a new trial. They say that the jury did not allow them the amounts proved of the set-off pleaded in Dodge's answer. On the other hand, the appellee says that, under the issues, they were not entitled to any deduction on account of such set-off.

The note sued on was executed by both defendants. The set-off pleaded was in favor of Dodge alone, and there is no allegation that he was principal and Cown surety only. The allegations do not bring the case within sec. 58, 2 G. & H. 89, which allows any one of several makers of a note or other contract, who is a principal and the others sureties, to set off a claim in his favor against the plaintiff or any former holder of such note or contract. The section does not dis-

Dodge *et al.* v. Dunham.

pense with the requisite of mutuality required in other cases. *Johnson v. Kent*, 9 Ind. 252; *Knour v. Dick*, 14 Ind. 20; *Blankenship v. Rogers*, 10 Ind. 333.

In the case last mentioned, the defendant answered by way of set-off, alleging that the plaintiff was indebted to him, the defendant, by two notes executed by plaintiff and one Hallick; and although the court overruled a demurrer to the answer, it refused to allow the claim as a set-off on the trial. This court affirmed the judgment, and said: "The court, in its refusal to allow the set-off, committed no error."

The order of the trial in the court below was as follows: The plaintiff introduced his note and the written indorsement thereon by the payee, and rested. The defendants then introduced evidence in support of the set-off in Dodge's answer, and affecting other issues in the case, and rested. The plaintiff introduced evidence in support of his reply of set-off, and rebutting the defendants' evidence, and rested. The defendants then introduced a witness, and offered to prove by him that all the items of the plaintiff's set-off had been paid before the commencement of the action. The plaintiff objected to it, on the ground that he had the close of the evidence. The objection was sustained, and the defendants excepted.

If the evidence was admissible at all under the pleadings, it was erroneously rejected. Under the practice of the court below, great injustice might be done to a party. Neither party was bound to anticipate the evidence of the other. Until the party having the burthen of the issue had introduced evidence in support of such issue, it was unnecessary for the other to introduce any to defeat it. After that, it was his privilege to do so; and then the other might close with rebutting evidence. So that if the evidence offered had been admitted, the plaintiff would not thereby have been deprived of, or lost his right to, the close of the evidence.

No evidence in support of the set-off in Dodge's answer was admissible, for reasons hereinbefore stated, hence the

court committed no error of which the appellants can avail themselves in rejecting the evidence offered, or for overruling the motion for a new trial, because no more of Dodge's set-off was allowed.

Another reason urged by appellants why they ought to have a new trial is, that they offered to prove by Dodge that he relied exclusively upon the representations of Millspaugh as to the amount of the stock of goods and value thereof, and that the court refused to allow them to do so, on the plaintiff's motion, to which they excepted. Dodge had been on the witness stand, and testified fully in his own behalf. He was afterward recalled, and again gave evidence. It was on the second examination that he proposed to give the evidence which was rejected. On his first examination, he had testified on the same subject, that Millspaugh had guaranteed that the stock was as large as when he had bought it of him; that after Millspaugh made that guaranty he accepted the goods for his debt; that he "relied upon Millspaugh's guaranties and made the purchase on them." It was no error to refuse to permit him to reiterate the statement.

During the trial the defendants offered to prove by Dodge that the whole stock of goods, sold at wholesale values, would only amount to two thousand seven hundred dollars. The court sustained an objection made by the plaintiff to its introduction, and the defendants excepted. This ruling is urged as a reason why a new trial ought to have been granted. The allegation in the answer is, that Millspaugh represented and guaranteed that the stock of goods would inventory, at "wholesale prices," etc. The language meant the wholesale prices at which he had purchased them, and not the value which might be put upon them at the time. Indeed, we think the transaction, as testified to by Dodge himself, shows that he did not understand that the price was based upon actual value. He had sold the stock of goods to Millspaugh, and there remained about two thousand eight hun-

Dodge et al. v. Dunham.

dred dollars to three thousand four hundred dollars of the purchase-money unpaid. He testified that the goods invoiced, when he sold to Millspaugh, between five thousand nine hundred dollars and six thousand dollars. So that he must have received from two thousand five hundred dollars to three thousand dollars in payment for them, and was about to take them back, cancel the indebtedness, and give his notes for one thousand dollars. The court committed no error in refusing to allow the defendants to introduce the evidence.

The next reason urged why the court should have granted a new trial is, that the verdict of the jury is contrary to law and unsupported by the evidence as to Cown. It is contended that the verdict should have been that Cown was a surety. Cown's answer admitted the execution of the note, and that he had no defence to it. It was filed to secure the benefit of sec. 674, 2 G. & H. 308. That section provides, that "when any action is brought against two or more defendants upon a contract, any one or more of the defendants being surety for the others, the surety may, upon a written complaint to the court, cause the question of suretyship to be tried and determined, upon the issue made by the parties, at the trial of the cause, or at any time before or after the trial, or at a subsequent term; but such proceeding shall not affect the proceedings of the plaintiff."

The statute contemplates a written complaint by the surety in the nature of a cross complaint against the principal, and pleadings, issues, and trial thereon the same as upon any other cross complaint. No such complaint was filed in this case. Still Dodge made no objection to it on that account, but went to trial and allowed the issue to be submitted to a jury. He does not even now raise any question as to the form or manner of making the issue of suretyship, but joins with Cown in asking for a reversal of the judgment, because the jury failed to find that he was a surety. It was an issue in which the appellee had no interest. The statute declares

that the proceedings shall not affect the proceedings of the plaintiff. *Dickerson v. Turner*, 12 Ind. 223.

The issues may be tried at, or before, or after the trial of the cause, or even at a subsequent term. If the issues shall be determined in favor of the surety, the court shall make an order directing the sheriff to levy the execution first upon and exhaust the property of the principal before a levy shall be made upon the property of the surety, and the clerk shall indorse a memorandum of the order on the execution.

The motion of Cown as against Dodge should have been granted. There was but one witness on the issue of suretyship, and he testified positively that Cown signed the note as surety. But this does not, in any manner, affect the rights of Dunham, the appellee. The motion was correctly overruled as between him and the appellants.

We have examined the evidence, and think it sustains the verdict.

The judgment of the court below, in favor of the appellee against the said appellants, is affirmed, with costs and five per cent. damages. And as between the said appellants alone as to the suretyship of said Cown, and so far as the same renders him liable as principal, said judgment is reversed, with costs against said Dodge, with instructions to said court to grant to said Cown a new trial, as against said Dodge, on the issue of suretyship, and for further proceedings therein in accordance with this opinion. Such reversal in no manner to stay the execution or affect the proceedings of said appellee on his said judgment against the said appellants.

J. H. Baker and *J. A. S. Mitchell*, for appellants.

W. A. Woods, for appellee.

Hain v. North-Western Gravel Road Company.

HAIN v. NORTH-WESTERN GRAVEL ROAD COMPANY.

PLEADING.—*Complaint.*—*Demurrer.*—A defective complaint will be so adjudged on a ruling upon a demurrer to a bad answer.

SAME.—*Turnpike.*—In an action to recover the amount subscribed for stock to the articles of association of a gravel road company, by which the subscribers proposed to become incorporated thereafter, the complaint must allege that a subscription was obtained amounting to five hundred dollars per mile of the proposed road, and that the articles of association were filed in the proper recorder's office.

SAME.—In such action, the complaint must show by averment of fact that all the steps required by law to bring such corporation into existence have been taken.

SAME.—*Conclusion of Law.*—The averment that the company was legally organized is a conclusion of law, not an averment of fact.

SAME.—The additional averment, that the defendant entered into such organization, adds no force to the former averment, it not appearing how he entered, or what he did.

APPEAL from the Tippecanoe Common Pleas.

WORDEN, J.—This was an action by the appellee against the appellant, to recover five hundred dollars subscribed by the appellant for the stock of the company. The subscription was made to the articles of association.

There was an answer filed to the complaint, setting up a cotemporaneous verbal agreement, inconsistent with the written contract. To this a demurrer was sustained, and the defendant excepted. Final judgment for the plaintiff.

The ruling on the demurrer is assigned for error; also, that the complaint does not state facts sufficient, etc.

It is not claimed by counsel for the appellant that the answer was good, but it is insisted that the complaint was radically bad.

The complaint does not allege that a subscription was obtained, amounting to five hundred dollars per mile of the proposed road, or that the articles of association had been filed in the proper recorder's office. This, according to the case of *Haun v. The Mulberry and Jefferson Gravel Road Co.*, 33 Ind. 103, and cases there cited, renders the complaint radically defective.

Had the subscription been made to a company professing

Hart v. Crawford, Executrix.

to have a corporate existence, the defendant would have been estopped to deny such corporate existence. But as the subscription was to articles of association, by which the subscribers proposed to become incorporated thereafter, it is necessary, in order to recover on such subscription, to show by averment that all the steps have been taken which are required by law to bring such corporation into existence.

The complaint alleges that, subsequent to the subscription, the company "was legally organized, in which organization the defendant entered." The averment that the company was legally organized is a conclusion of law rather than an averment of fact. *The Indianapolis, etc., R. R. Co. v. Robinson*, 35 Ind. 380.

On the facts being stated, it would be a question of law, whether the corporation was legally organized; but there are no facts stated, from which any legal inference can be drawn.

The averment that the defendant entered into the organization adds no force to the statement. How he entered, or what he did, does not appear. There is nothing in this allegation that dispenses with the necessity of showing in the complaint that such things were done as were necessary to create a valid corporation. We must hold that the complaint was defective.

The judgment below is reversed, with costs, and the cause remanded, with leave to the parties to amend their pleadings.

A. J. Roush and R. P. Davidson, for appellant.

HART v. CRAWFORD, EXECUTRIX.

PLEADING.—*Answer.*—*Payment.*—*Accord and Satisfaction.*—To a complaint by an executor upon a due-bill, the defendant answered that he had paid the deceased the full amount of principal and interest due, "and the sum of money was paid in goods, wares, and merchandise, and was paid in full satisfaction of said note, and was so received by the deceased in his lifetime."

Hart v. Crawford, Executrix.

Held, that the answer was good, and in form a plea of payment

Held, also, that it was substantially a good answer of accord and satisfaction.

SAME.—*Certainty*.—Want of certainty in a pleading is not good ground of demurrer.

PAYMENT.—Payment may be made in anything that the creditor will receive as payment.

APPEAL from the Hancock Circuit Court.

WORDEN, J.—Action by the appellee against the appellant upon the following instrument:

"\$155.42.

MARCH 26th, 1860.

"Due Nathan Crawford one hundred and fifty-five dollars and forty-two cents, for value received.

(Signed)

"A. T. HART."

Issue, trial, verdict and judgment for the plaintiff.

The defendant pleaded, first, as follows: "Comes now the defendant, by his attorneys, and for answer to plaintiff's complaint, says that said defendant has long since paid to said decedent the full amount of one hundred and fifty-five dollars, and the interest due on said due-bill or note sued upon, and the sum of money was paid in goods, wares, and merchandise, and was paid in full satisfaction of said note, and was so received by the decedent in his lifetime; wherefore said defendant demands judgment."

A demurrer was sustained to this paragraph of the answer, for want of sufficient facts, and the defendant excepted. This ruling is assigned for error.

We are of opinion that the paragraph was substantially good, and that the court erred in sustaining the demurrer.

The answer is, perhaps, in form, an answer of payment. But payment may be made in anything that the creditor will receive as payment. *Louden v. Birt*, 4 Ind. 566; *Tilford v. Roberts*, 8 Ind. 254.

But if its validity as an answer of payment were doubtful, it is substantially a good answer of accord and satisfaction. It alleges that the goods, wares, and merchandise were received by the decedent in full satisfaction of the note. The only objection urged here to the paragraph is, that it does

Miller v. Weida et al.

not state either the kind or quantity of goods paid by the defendant and received by the decedent in satisfaction of the debt. This objection goes to the want of certainty in the paragraph, and not to the want of substance. If the pleading was not sufficiently certain, a point on which we express no opinion, the court, on motion, might have required it to be made more certain; but it was not, on that ground, bad on demurrer. 2 G. & H. 112, sec. 90, and note 1; *Snowden v. Wilas*, 19 Ind. 10; *Fultz v. Wycoff*, 25 Ind. 321.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to overrule the demurrer to the paragraph of the answer in question.

R. A. Riley, for appellant.

W. R. Hough and *W. March* for appellee.

MILLER v. WEIDA ET AL.

SHERIFF.—*Fee Bill.*—*Justification of Officer.*—A fee bill, legal upon its face and showing jurisdiction in the court from which it issued, is a justification to an officer acting under it in making a levy and sale of property.

SAME.—The fact that the costs for which the fee bill was issued were made by a party to the suit in which they originated, other than the party against whom the fee bill was issued, and should properly have been taxed to that other party, does not render the sheriff a trespasser.

APPEAL from the Clinton Circuit Court.

OSBORN, J.—The appellant instituted an action for trespass against the appellees, to recover the value of two cows of the alleged value of one hundred dollars.

The defendants filed separate answers. Weida answered by a general denial. Franklin filed an answer of three paragraphs. 1st. The general denial. 2d. He admits taking the property named in the complaint, but says that at the time he was sheriff of Clinton county, and took the same in his

official capacity, by virtue of and upon a certain fee bill issued by the clerk of the Clinton Common Pleas Court for the collection of costs made by and due from plaintiff in a cause in said court, set out and itemized in said fee bill, and sold the same for the satisfaction of said costs, a copy of which is filed therewith. The third paragraph differs from the second by stating that the fee bill was issued for certain costs made by and due from plaintiff on a judgment rendered against him in the common pleas court of that county. Copies of the judgment, fee bill, and return were filed with the answer.

The plaintiff filed separate demurrers to the second and third paragraphs of Franklin's answer, which were overruled, and exceptions taken. He then filed a reply of three paragraphs; first, the general denial; second, that the costs mentioned in the second paragraph of Franklin's answer were costs made and properly taxable to William Johnson the plaintiff in the action in which the fee bill issued; third, the same allegation with reference to the third paragraph of Franklin's answer contained in the second paragraph of the reply to the second paragraph of the answer. To each of the replies the defendant filed a demurrer; the demurrers were sustained, and exceptions were taken.

The cause was tried by the court, which resulted in a verdict for the defendant, the appellee. The appellant filed a motion for a new trial, stating as causes, first, that the decision and judgment of the court was not sustained by sufficient evidence; second, that it was contrary to law, and not sustained by sufficient evidence given in the cause; third, that it was contrary to law. The motion was overruled, to which he excepted. Final judgment was rendered on the findings.

The errors assigned are, first, overruling the demurrers to the several answers of Franklin; second, sustaining the demurrers to his second and third paragraphs of reply to Franklin's answer; third, overruling his motion for a new trial.

Talcott *et al.* v. Jackson *et al.*

The court committed no error in overruling the demurrers to the answers. The fee bills mentioned in those paragraphs were legal upon their face, and showed jurisdiction in the court from which they were issued. "The law is, that a writ, having these characteristics, however irregularly issued, even though there be no judgment on which to found it, is a justification to an officer acting under it." *Gott v. Mitchell*, 7 Blackf. 270.

The demurrers to the replies were correctly sustained. 7 Blackf. *supra*. The fact that the costs for which the fee bills were issued were made by Johnson, and properly taxable to him, did not make the sheriff a trespasser for executing a writ, valid on its face. If the costs were improperly taxed to the appellant, his remedy was not by an action against the sheriff, but by a re-taxation, and, if necessary, an injunction to restrain proceedings by the sheriff until his motion for that purpose could be heard.

The evidence fully sustains the finding of the court.

The judgment of the Clinton Circuit Court is affirmed, with costs.

J. McCabe, for appellant.

L. McClurg, for appellees.

TALCOTT ET AL. v. JACKSON ET AL.

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170	315

MOTION FOR NEW TRIAL.—*Surprise.*—*Newly-Discovered Evidence.*—*Presumption.*—Where a plaintiff's motion for a new trial, on the ground of surprise at the evidence delivered by the defendant, and on the ground of newly-discovered evidence, by which the evidence that operated as a surprise can be disproved, is supported by an affidavit of the plaintiff's attorney, and is overruled, and a continuance to enable the affidavit of the plaintiff to be produced is refused, if the evidence is not in the record, the presumption is in favor of the ruling of the court below.

EVIDENCE.—*Agreement as to Admission of.*—Where it is agreed between the plaintiff and the defendant, and entered of record, that all evidence may be

Talcott *et al.* v. Jackson *et al.*

given under the general issue, or general denial, it is necessarily and conclusively implied that a proper finding and judgment shall be rendered on the evidence thus introduced.

SAME.—By such agreement the parties waive the right to have the proper pleadings put upon file in the case, and cannot afterward complain that it was not done.

APPEAL from the Grant Common Pleas.

WORDEN, J.—This was an action on contract by the appellants against the appellees. Issue, trial by the court, finding and judgment for the defendants against the plaintiffs for the sum of one hundred and thirty-two dollars and thirty-one cents.

There was a motion by the plaintiffs for a new trial, which was overruled, and exception taken.

There was an affidavit filed by the plaintiffs' attorney, showing surprise and newly-discovered evidence. The attorney of the plaintiffs asked a continuance of the cause in order to enable him to procure the affidavits of the plaintiffs, who reside in another state, as to the surprise.

Had the plaintiffs' affidavits been filed, we do not see how they would have added anything to the surprise stated in the affidavit of their attorney.

The surprise consisted of the evidence delivered by the defendants as witnesses. It is not stated that the plaintiffs could or would swear contrary to the evidence of the defendants. But it is stated in the affidavit that since the trial a witness has been discovered residing at Indianapolis, by whom the evidence of the defendants, which operated as a surprise upon the plaintiffs, can be disproved. The affidavit of the newly-discovered witness was not produced, nor was a continuance asked in order to enable the plaintiffs to procure such affidavit. We are of opinion that no error was committed in overruling the motion for a continuance, in order to procure the plaintiffs' affidavits of surprise, or in overruling the motion for a new trial. It may be further observed that the evidence is not in the record, and the presumptions are in favor of the ruling below.

One other question is presented by the record, and it grows

out of the following state of the pleadings, and the agreement of the parties. The defendants had filed a paragraph of answer, setting up a set-off to the claim of the plaintiffs, and demanding a judgment in their favor.

To this paragraph a demurrer was sustained, and the defendants excepted.

The cause was submitted to the court for trial, and the entry on the order book proceeds as follows: "And it is agreed by all the parties that all evidence may be given under the general issue herein." A bill of exceptions states the agreement substantially in the same way.

A motion in arrest of any judgment in favor of the defendants against the plaintiffs, except for costs, was made by the plaintiffs and overruled. Exception.

The defendants below, it will be seen, have obtained a judgment against the plaintiffs for a balance found in their favor, without any pleading to support it. In respect to the set-off, the defendants stood in the situation of plaintiffs, and they have a judgment in their favor, without any statement, by way of pleading, of their cause of action.

The question arises whether, under the agreement of the parties thus entered of record, the appellants can take any advantage of the want of proper pleading to support the judgment. We have had some doubts upon this question, but have concluded that they cannot.

The agreement is broad in its terms, and provides, that "all evidence may be given under the general issue herein."

The defendants having pleaded a set-off, though the paragraph setting it up was held bad on demurrer, the plaintiffs must have been fully apprised that evidence of the set-off would be offered under the agreement. Indeed, we think we may well infer that the agreement was made with a view, amongst other things, to obviate the necessity of amending that pleading. There can be no doubt that, under the agreement, evidence of a set-off equal to the plaintiffs' claim was admissible. And if admissible to that extent, why not to the extent of any balance that might be due the defendants?

 Reeves *et al.* v. Plough.

The language of the agreement is, that "all evidence may be given," etc., and not all evidence in defence of the plaintiffs' action, merely.

The agreement being that all evidence might be given under the general issue, or general denial, we think it was necessarily and conclusively implied that a proper finding and judgment should follow the introduction of the evidence. The plaintiffs, when they thus agreed to the introduction of the evidence, impliedly agreed to the proper finding and judgment of the court therein.

They waived the right to have the proper pleadings put upon file in the case, and cannot now complain that it was not done.

The judgment below is affirmed, with costs.

J. L. Custer, S. E. Perkins, and S. E. Perkins, Jr., for appellants.

A. Steele, R. T. St. John, and G. Harvey, for appellees.

41	204
196	491
41	204
138	592
41	201
138	66

 REEVES ET AL. v. PLOUGH.

BILL OF EXCEPTIONS.—*Demurrer.—Striking Out.*—If a demurrer to a paragraph of a complaint is overruled, and the paragraph is afterward struck out on motion, and not again put into the record by a bill of exceptions, it is not a part of the record, and the overruling of the demurrer to it cannot be assigned as error.

SAME.—A question arising upon the action of a court in striking out a paragraph of a pleading can only be reserved by a bill of exceptions.

INTERROGATORIES TO JURY.—*Imperfect Answers.*—Where the answers to interrogatories propounded to a jury are not full, if objection is urged to the discharge of the jury without a full finding, or if the court is asked to require the jury to find fully in answer to the interrogatories, the court should require such finding. But an objection to the finding cannot be made in the Supreme Court for the first time.

COLLATERAL SECURITY.—*Payment.*—The mere delivery of choses in action as collateral security for a debt cannot be pleaded as a payment of the debt.

SAME.—*Diligence to Collect Collaterals.*—The holder of such collaterals is answerable for reasonable, but not extraordinary, diligence in their collection.

SAME.—If collaterals are lost for want of reasonable diligence, the creditor holding them must account for the amount, but such loss cannot be presumed from the mere fact of their remaining uncollected.

SAME.—If collaterals are held to secure the payment of a note, and, before judgment on the note, there has been payment of the collaterals, or such want of diligence in collecting the same as to make the holder responsible for the amount of them, this will constitute a defence to an action on the note, and it cannot be set up afterward as a payment of the judgment on the note.

MOTION FOR NEW TRIAL.—*Instructions to Jury.*—A motion for a new trial, on the ground of error in refusing or giving instructions, must specify the instructions alleged to have been given, which were incorrect, and those refused, which should have been given.

SAME.—*Evidence.*—A motion for a new trial on the ground of the improper admission of evidence must point out the evidence improperly admitted.

SAME.—*Demurrer.*—The overruling of a demurrer to a pleading is not a reason for a new trial.

APPEAL from the Howard Common Pleas.

DOWNNEY, J.—This was a proceeding instituted by the appellee against the appellants, to have satisfaction of a judgment ordered, which had been rendered in favor of the appellants against the appellee, as authorized by 2 G. & H. 220, sec. 377. The motion assumed the form of a regular complaint. An issue, by general denial of the complaint, was formed; there was a trial by jury; a verdict for the plaintiff; a motion by the defendants for a new trial overruled; and a judgment rendered, by which the judgment was declared satisfied, and the defendants perpetually enjoined from attempting to collect the same, or any part thereof.

Several errors are assigned in this court by the appellants, which we will consider in their order.

The first is, that the court erred in overruling the appellants' demurrer to the first paragraph of the complaint. The record shows that a demurrer to the first paragraph of the complaint was filed, and overruled by the court; but it also shows that afterward the first and second paragraphs of the complaint were stricken out, on motion of the defendants, and that the issue was formed and the case tried upon the third paragraph of the complaint alone. The overruling of the demurrer to the first paragraph cannot, under these circum-

Reeves *et al.* v. Plough.

stances, be assigned as error. Strictly, that paragraph of the complaint having been stricken out, and not again put into the record by bill of exceptions, is not any part of the record. *Meyer v. Yesser*, 32 Ind. 294. This has been often decided by this court.

The second alleged error is the refusal of the court to strike out the second and third paragraphs of the complaint. As we have already remarked, the record shows that the second paragraph of the complaint was stricken out, on the motion of the defendants. But this is a question which can only be reserved by a proper bill of exceptions. None was filed in this instance, and for this reason the question is not before us for decision. *Clem v. Martin*, 34 Ind. 341. There are other cases to this effect. In addition to this, there was no motion to strike out the amended third paragraph of the complaint.

All the other alleged errors may be considered under that which assigns the improper overruling of the motion for a new trial. The reasons for a new trial, stated in the motion, are, first, the verdict does not decide any issue made between the parties; second, the finding of the jury, in their answers to the interrogatories, is not sustained by the evidence; third, the finding of the jury is contrary to the law and evidence; fourth, the court gave charges to the jury, asked for by the plaintiff, which were given over the objection of the defendants; fifth, the jury found against the direct charges of the court; sixth, the court permitted the plaintiff to give to the jury evidence not admissible under the issue made by the pleadings; seventh, the court refused to give the jury charges asked for by the defendant, which were the law; eighth, the court erred in overruling the demurrer to the complaint.

The complaint alleged that the judgment had been fully satisfied, and the jury returned a general verdict for the plaintiff, besides certain special findings, which are entirely consistent with it. If the fact that the verdict was not responsive to any issue in the case is or can be in any case a

good reason for a new trial, still we think the verdict in this case was clearly good in that respect.

We think the findings of the jury, in answer to the interrogatories, are sustained by the evidence. But the answers were not full, and if an objection had been urged against the discharge of the jury without a full finding in answer to them, or if the court had been asked to require the jury to find fully in answer to them, the court should have required such full finding. But this was not done. *Rosser v. Barnes*, 16 Ind. 502; *Buntin v. Rose*, 16 Ind. 209. The objection that the findings are not perfect cannot be made now for the first time.

In our opinion, the third reason for a new trial should have been sustained by the court. The complaint alleges "that the judgment is paid off, and should so appear of record." The evidence shows that a note of the appellee to the appellants was placed in the hands of their attorney for collection in 1853. In April of that year, the appellee placed in the hands of the said attorney notes on various solvent persons, to the amount of the note of the appellee, and enough more to pay attorney's fees for collecting the same, and which were so placed in the hands of said attorney as collateral security for the payment of the note of the appellee. The attorney testified that this was done with the consent and subsequent approval of the appellants; while they deny, in their testimony, ever having consented to or approved of the arrangement.

On the 10th day of April, 1867, the appellants recovered a judgment against the appellee in said common pleas court for the full amount of the note due from the appellee to them, and were about to enforce the collection thereof by execution when this proceeding was commenced, in July, 1871. There was no evidence that any part of the collaterals had been collected, or that there had been any failure on the part of the appellants to make use of reasonable diligence to collect the same, unless the mere lapse of time, and the fact that the claims had not been collected, show

Reeves *et al.* v. Plough.

such want of reasonable diligence. The mere delivery of choses in action as collateral security for a debt cannot be pleaded as a payment of the debt. The holder of such collaterals is answerable for reasonable, but not extraordinary, diligence in their collection. If the collaterals have been lost for the want of reasonable diligence, the creditors holding them must account for the amount; but such loss cannot be presumed from the mere fact of their remaining uncollected. *Kiser v. Ruddick*, 8 Blackf. 382; *Dugan v. Sprague*, 2 Ind. 600; *Slevin v. Morrow*, 4 Ind. 425.

If there had been payment or such want of diligence in collecting the collaterals as to make the appellants responsible for the amount of them, prior to the rendition of the judgment in 1867, that would have constituted a defence to the action on the note, and it could not be set up afterward as the payment of the judgment; for being a defence to the action, the appellee should have pleaded it as such, and thus prevented the rendition of the judgment against him. There was no evidence of anything which took place after the rendition of the judgment tending in the least to show its payment or satisfaction. The question in issue was the payment of the judgment, and not whether the note had been paid before judgment was rendered upon it. The evidence is clear and uncontradicted that the judgment plaintiffs never received any part of the amount due them, either before or after the rendition of the judgment.

The fourth reason, that the court gave charges to the jury asked for by the plaintiff, which were given over the objection of the defendants, seems not to involve any error. The fact that the charges were given over the objection of the defendants does not assert or imply that the charges were not according to law. Beside this, the motion for a new trial is too indefinite. This court has constantly held that the motion for a new trial must specify more certainly the particular charge or charges which are alleged to be incorrect in order to raise any question.

The jury found against the direct charges of the court, is

Brown v. The Liberty, Roseburg, and Dunlapville Gravel Road Co. et al.

the fifth reason for a new trial. Perhaps this reason does not involve any other question than that the verdict is contrary to law, which we have already considered under the third ground specified in the motion.

The sixth reason, that the court permitted the plaintiff to give evidence not admissible under the issues, should have pointed out more particularly what evidence was thus improperly admitted.

The next ground is, that the court refused to give the jury charges asked for by the defendant, which were the law. If these charges were the law, and applicable to the case, and had not been given to the jury in other charges, the court should have given them. But how shall we know what charges are intended? As there are a number of them in the record, the particular charges should have been designated. The bill of exceptions does not any more particularly specify the charges refused.

The overruling of the demurrer to the complaint was no reason for a new trial. It was not an error occurring during the trial.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial, and for further proceedings.

J. W. Robinson, for appellants.

C. N. Pollard, for appellee.

BROWN v. THE LIBERTY, ROSEBURG, AND DUNLAPSVILLE
GRAVEL ROAD CO. ET AL.

PRACTICE.—*Assignment of Error*.—If the sustaining of a demurrer to a pleading be not assigned as error, no question as to the ruling on the demurrer is presented to the Supreme Court.

APPEAL from the Union Common Pleas.
VOL. XLI.—14

Helms v. Love.

DOWNEY, J.—This was a complaint by the appellant against the appellees, to enjoin the collection of certain taxes, which had been assessed and levied against the lands of the appellant, for the construction of the road of said company, the company having been organized under the act of March 6th, 1865. A demurrer was filed by the appellees to the complaint, which was sustained by the court, and thereupon final judgment was rendered for them.

The sustaining of the demurrer is not assigned for error, and there is no other question in the record.

The judgment is affirmed, with costs.

J. S. Reid, for appellant.

B. F. Claypool, for appellees.

HELMS v. LOVE.

DECEDENTS' ESTATES.—*Sale of Real Estate.—Notice of Petition.—Widow.—Evidence.*—Where real estate of a decedent was sold by the administrator, under an order of court, for the purpose of paying debts of the deceased, but no notice was given of the pendency of the petition for the sale, but a writing containing a waiver of notice and consent to the sale was signed by the widow as guardian of minor heirs, but not in her own right as widow;
Held, in an action for partition brought by the widow, that the sale did not pass the widow's one-third of the real estate to the purchaser, and that the record of the proceedings and order of sale were inadmissible in evidence to show the sale of said one-third.

APPEAL from the Carroll Circuit Court.

DOWNEY, J.—The appellant brought this action against the appellee for the partition of certain real estate, of which she claimed that she was the owner of one-third, and alleged that the defendant was the owner of the other two-thirds. She was unsuccessful in the action, and has brought the record to this court, by appeal, for the correction of what she alleges was an error in the circuit court.

The cause was tried by the court, and the proper motion was made for a new trial, and exception taken to reserve the question. The appellant claimed the one-third of the land as widow of George R. Helms, deceased, and the appellee claimed it all under a sale made by the administrator of the estate of the deceased, by order of the common pleas of Hancock county.

The appellant, on the trial, proved, by the deed of conveyance to her husband, that he was the owner of the land at the time of his decease. She proved, also, his death, and that she was his widow. The appellee offered, in evidence, the record of the Hancock Common Pleas, to prove the sale of the land. To this she objected, but it was admitted over her objection. The record shows the filing of a petition in the usual form, except that the widow was made a party to it as one of the heirs of the deceased. No notice was given of the filing and pendency of the petition, but the following paper was filed:

"We, the undersigned, heirs-at-law of George R. Helms, deceased, being of lawful age, hereby express our assent to the sale of the following described real estate, situated in," etc., describing the real estate in question, "to make assets to pay the liabilities of said decedent's estate, who was, at the time of his death, the owner of the above-described lands, and we hereby waive notice by publication, as by law required, in compliance with section 77, page 265, 2d volume of the Revised Statutes of Indiana. We, the undersigned guardian of the minor heirs of George R. Helms, deceased, hereby join in assent with the adult heirs of said decedent in the within agreement.

"ELIZABETH J. HELMS,

Guardian of Nancy J. Helms, Jas. W. Helms, Wm. F. Helms. }

CYRUS HELMS,

AARON VAIL,

MARY E. VAIL,

SAMUEL AMETT,

ELIZABETH J. AMETT."

Hayward et al. v. Davidson et al.

Upon this assent, the court ordered the sale of the land. The sale was made, reported, approved, and a deed made by order of the court, to the appellee. It is stated in the petition of the administrator that Nancy J. Helms, James W. Helms, and William F. Helms were minors, and that the other defendants in the petition were adults. The petition prayed for an order for the sale of the whole real estate, and it was all appraised, all ordered to be sold, all sold, and all embraced in the report and deed of conveyance.

The question, and the decisive question, in the case is, did this sale pass the widow's one-third of the real estate? and was the record admissible to show that fact? We think the sale did not pass the widow's one-third of the land, and that the record was improperly admitted in evidence to show that fact. We base our opinion on the fact that the written assent to the sale is not signed by the widow, otherwise than as guardian for her minor children. It does not purport to show any assent by her, in her own right, to the sale of the land. There was no evidence outside of the record to show that she was not the owner of one-third of the real estate.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial, and for further proceedings.

W. O'Brien, for appellant.

41	212
128	49
41	212
144	109

HAYWARD ET AL. *v.* DAVIDSON ET AL.

WILL.—*Devise of Real Estate to County.*—A devise of lands in these words: "I give and bequeath unto the board of commissioners of Kosciusko county, to be appropriated by the board of commissioners, and their successors in office, for the use of Kosciusko county forever," etc., vested the absolute title in fee simple in the lands in the county of Kosciusko, to be managed by the board

of commissioners or such other body or persons as the general assembly has provided or may provide to take the place of the board of commissioners.

CORPORATION.—Power to Hold Real Estate.—With reference to their power to take and hold real estate, corporations may be classified as follows:

First. Those whose charters, or laws of creation, forbid that they should acquire and hold real estate. Such corporations cannot take and hold real estate, and a deed or devise to such a corporation can pass no title.

Second. Those whose charters, or laws of creation, are silent as to whether they may or may not acquire and hold real estate. In such a case, if the objects for which the corporation is formed cannot be accomplished without acquiring and holding real estate, the power so to do will be implied.

Third. Those whose charters or laws of creation, authorize them, in some cases, and for some purpose, to take and hold the title to real estate.

Fourth. Those whose charters, or laws of creation, confer upon them a general power to acquire and hold real estate. Corporations thus empowered may take and hold real estate, as freely, and fully, and perfectly as natural persons may take and hold.

SAME.—County.—Power to Acquire and Hold Real Estate.—Counties are *quasi* corporations, and fall within the third class above given, and in some cases, and for some purposes, are authorized to take and hold title to real estate. They are expressly empowered to acquire and hold title to real estate for a location for county buildings and for a poor farm, and there may be other instances.

SAME.—Where a corporation is authorized to acquire and hold title to real estate for some purposes, it cannot be made a question by any party, except the State, whether or not real estate acquired by such corporation has been acquired for the authorized uses or not.

APPEAL from the Kosciusko Circuit Court.

PETTIT, C. J.—The only question in this case is, whether a devise in these words will vest a title in the board of commissioners, or in the county, for the property: "I give and bequeath unto the board of commissioners of Kosciusko county, to be appropriated by the board of commissioners, and their successors in office, for the use of Kosciusko county forever." These are not the very words of the will, but it is agreed this is their purport and intent, and that they are to be so taken and understood as their proper meaning.

Whether the county or board of commissioners is named, is all the same thing in law, for the one is the other for all legal or practicable purposes.

Any person or corporation who can hold land in this State may take by devise. 2 G. & H. 551, sec. 1.

Hayward *et al.* v. Davidson *et al.*

The board of commissioners is a corporation, and has all the rights of other corporations. 1 G. & H. 248, sec. 5.

We hold that the bequest vested in the county of Kosciusko, to be managed by the board of commissioners, or such other body or persons as the general assembly has or may provide to take the place of the board of commissioners, a fee simple and absolute title in the lands thus bequeathed. The laws of Ohio and our own are substantially the same, and the case of *Carder v. The Board of Commissioners of Fayette County*, 16 Ohio St. 353, is fully, directly, and conclusively in point. All wishing further information on this question are referred to that case, which we fully approve.

The judgment is affirmed, at the costs of the appellants.

ON PETITION FOR A REHEARING.

DOWNNEY, J.—A petition for a rehearing has been filed in this case, in which it is insisted that the ruling of the court, in affirming the judgment of the circuit court, is erroneous. We have re-examined the question decided, and have reached the conclusion that the judgment was rightly affirmed, and that the petition for a rehearing ought to be overruled.

The majority of the court, however, prefer to put the decision of the case on somewhat different ground rather than to say that a county may, for all purposes, take and hold the title to real estate.

Corporations, when considered with reference to their power to take and hold real estate, may be classified.

First. There are those whose charter, or law of creation, forbids that they should acquire and hold real estate. When this is the case, the corporation cannot take and hold real estate, and a deed or devise to such a corporation can pass no title. *Angell & Ames Corp.*, sec. 152.

Second. Those whose charter or law of creation is silent as to whether they may or may not acquire and hold the title to real estate. It is as to corporations of this class that most of the difficulties and doubts arise. As a general

rule, it may be said that in such cases there is no power to acquire and hold such property. But if the objects for which the corporation was formed cannot be accomplished without acquiring and holding the title to real estate, the power to do so would undoubtedly be implied. The right to acquire and hold real estate is not enumerated among the powers or attributes of corporations in the statute of this State making general provisions concerning corporations. 1 G. & H. 268, sec. 2.

Third. Those corporations whose charter, or law of creation, authorizes them in some cases, or for some purposes, to take and hold the title to real estate. Counties, which are *quasi* corporations, fall under this division. They are expressly empowered to acquire and hold the title to real estate for a location for county buildings and for a poor farm, and there may be other instances. In these cases, the rule seems to be that, as the corporation may, for some purposes, acquire and hold the title to real estate, it cannot be made a question by any party, except the State, whether the real estate has been acquired for the authorized uses or not. The corporation having legal capacity to take the title, the deed or devise is effectual to convey the title to the corporation.

Judge DILLON, in his work on municipal corporations, sec. 444, lays the law down thus: "Whether a municipal corporation, with power to purchase and hold real estate for certain purposes, has acquired, and is holding, such property for other purposes, is a question which can only be determined in a proceeding instituted at the instance of the State. If there is capacity to purchase, the deed to the corporation divests the estate of the grantor, and there is a completed sale, and whether the corporation, in purchasing, exceeds its power is a question between it and the State, and does not concern the vendor." See, also, *Leasure v. Hillegas*, 7 S. & R. 313; *Chambers v. City of St. Louis*, 29 Mo. 543, and cases there cited; *Angell & Ames Corp.*, sec. 152.

Counsel for appellants admit that a county, in some instances, and for some purposes, may take and hold real es-

Brownlee v. Kenneipp.

tate. If the foregoing doctrine is correct, this admission is fatal to their case.

Fourth. Our last class of corporations is made up of those whose charter, or law of creation, confers upon them a general power to acquire and hold real estate. Corporations thus empowered may, of course, take and hold real estate as freely and as fully and perfectly as natural persons may take and hold.

The petition is overruled.

PETTIT, C. J., being indisposed, was absent.

E. Haymond, E. V. Long, T. A. Hendricks, O. B. Hord, and A. W. Hendricks, for appellants.

G. W. Frazier, H. S. Biggs, D. D. Pratt, D. P. Baldwin, and J. S. Frazer, for appellees.

BROWNLEE v. KENNEIPP.

SURPRISE.—*Motion for a New Trial.*—Except in particular cases, a party cannot be heard to say that he was surprised at the giving of evidence warranted under issues formed and tendered by himself.

SAME.—*Affidavit of Stranger.*—An affidavit made by one who is not an agent or attorney of a party, or in any way connected with the case, wherein the affiant says he is informed and has reason to believe that a party has been surprised at evidence given, is bad.

EVIDENCE.—*Immaterial Variance.*—*Failure of Proof.*—In a suit upon a promissory note, where it appeared by the copy of the note filed with the complaint that it was due "one day after date," and the note introduced in evidence without objection commenced "one — after date;"

Held, that it was not a failure of proof, as contemplated by section 96 of the code, but an immaterial variance, fully provided for by sections 94, 95, 101, and 580 of the code.

APPEAL from the Gibson Common Pleas.

PETTIT, C. J.—Appellee brought suit against appellant and one Thompson, on a promissory note signed by their firm name, thus, "Thompson & Brownlee." Brownlee an-

41	216
128	408
41	216
139	288

swered by denying, under oath, the execution of the note. A proper reply was filed. Trial by the court; finding for the plaintiff; motion for a new trial overruled; exception; and this ruling is assigned for error; and judgment on the finding.

The first reason for a new trial was, surprise at the plaintiff's evidence. The evidence complained of, and at the giving of which the appellant claims he was surprised, was all legitimate and proper under the issue formed; and we do not think that a party can form an issue that warrants the giving of certain evidence, and then be heard to say that he was surprised at the giving of the evidence under the issue so formed and tendered by himself, except, perhaps, in particular cases, as when one party had told the other that such evidence would not be offered, which is not in this case. Besides, this was not sustained by the affidavit of the defendant, his agent, or attorney, or any person in any manner connected with the case, but, for all that appears, by an entire stranger to the case and parties; nor does he swear that he knows anything about the case, or that he knows that the defendant was surprised, but only that he is informed and has reason to believe that he is. The defendant was not at the trial, but was in Missouri, at his home, where he has resided for ten or more years; and how a stranger can make a proper affidavit in such a case, without having seen or heard from the defendant, we are not able to comprehend. It would have looked better if the affiant had sworn that he believed that the defendant would or might have been surprised at the evidence, if he had known anything about it. We cannot sanction this practice, and we hold that no error was committed in refusing a new trial for this cause.

The second reason for a new trial was, that the finding is not sustained by sufficient evidence. The evidence is in the record, and though it may be said to be somewhat conflicting, under the uniform ruling of this court, we cannot disturb the finding; but we have carefully examined the evidence, and it not only justified the finding, but required it,

Lammers v. Balfé et al.

as the credible evidence greatly and largely preponderates in favor of the action of the court.

It is contended that, as the note filed with the complaint was due one day after date, and the note copied into the bill of exceptions commences thus, "One — after date," without the word day in it, there was a failure of evidence, as contemplated by section 96 of the code. No objection was made to giving the note in evidence. We cannot concur in the position of appellant's counsel, but think it is a question fully provided for by sections 94, 95, 101, and 580 of the code. We are satisfied that no wrong was done, the appellant in the court below.

The judgment is affirmed, at the costs of the appellant. :

D. F. Embree, for appellant.

O. M. Welborn, for appellee.

LAMMERS v. BALFE ET AL.

PRACTICE.—*Bill of Exceptions.*—*Motion to Dismiss.*—To present any question on a motion to dismiss an appeal from a precept issued for the collection of an assessment for a street improvement, it must be properly reserved by a bill of exceptions.

SAME.—*Motion for Judgment.*—To present any question on the refusal of a court to render judgment on the sustaining of a demurrer to the transcript, on such appeal, the record must show a request for such judgment, and an exception to the refusal of the court to render the same.

SAME.—*Amendment.*—Where the record does not show an objection to the filing of an amendment to a complaint, and the proper exception to the ruling thereon, no question as to the filing of the amendment is reserved for review.

CITY.—*Appeal from Precept.*—*Transcript.*—On an appeal from a precept issued for the collection of an assessment for a street improvement, if it appears from an amended transcript that the precept was issued on an imperfect final estimate, and that the perfected final estimate was filed after the appeal was taken, and after a demurrer was sustained to the original transcript, the amended complaint or transcript will be bad on demurrer.

Lammers v. Balfe et al.

SAME.—Precept.—Common Council.—The common council has no right to issue a precept on an improper assessment.

SAME.—Correcting Final Estimate and Assessment.—The making of a correct assessment, after a precept has issued on an incorrect one, cannot relate back so as to make the precept good and defeat an appeal from the precept.

SAME.—Amendment of Transcript.—Where an act has been properly done, and the transcript does not show such act, and for that reason a demurrer is sustained to the transcript, an amendment may be made to the transcript, showing that such act was done.

APPEAL from the Tippecanoe Common Pleas.

DOWNEY, J.—This was an appeal from a precept issued by the order of the city council of Lafayette, for the collection of a certain amount assessed against the property of the appellant in favor of the appellees, as contractors, for street improvements. A demurrer to the transcript, which by law constitutes the complaint, was sustained, and the cause was continued. At the next term of the court, an amendment to the transcript was made and filed, consisting of an amendment of the final estimate made by the city council. The defendant then again demurred to the complaint, and his demurrer was overruled. He excepted, and filed an answer consisting of four paragraphs. The first was a general denial. The second alleged that the defendant was the owner of a certain tract of land, describing it, and stated that it was the tract of land intended to be described in the plaintiffs' complaint, and therein alleged to border on the said improvement, and averred that the same did not border on said street at the time the contract for the improvement was entered into. The third alleged that the place where the work was done and the improvement made was not, at the time of making the contract, a street within the corporate limits of the city of Lafayette, and that the estimates were unjustifiable and illegal. The fourth stated that the work was not done according to contract.

Upon demurrers to the second, third, and fourth paragraphs of the answer, they were held sufficient. The plaintiffs replied by a general denial. There was a trial by the court, a finding for the plaintiffs, a motion made by the de-

Lammers v. Balfe et al.

fendant for a new trial overruled, and judgment for the plaintiffs.

The first alleged error is the refusal of the court to dismiss the appeal, on motion of the defendant, after the demurrer was sustained, and before the amendment. There is no bill of exceptions reserving this point. The clerk's entry shows that the motion was made, but the grounds of it are not shown. The entry shows that the plaintiffs then filed an affidavit, which is not in the record, and then the court overruled the motion. The point is not properly presented for our consideration.

The second alleged error is the refusal of the court to render judgment on the sustaining of the demurrer to the transcript. There does not appear to have been any request for such judgment by the defendant, nor any objection or exception to the failure of the court to render the same.

The third alleged error is the allowing of the plaintiffs to file the amendment to the complaint, over the objection of the defendant. The record does not show any objection to the filing of such amendment to the complaint. The objection was not made, nor the question reserved in any way.

The fourth alleged error is the overruling of the demurrer to the complaint as amended. The transcript, as amended, shows that the precept was issued on an imperfect final estimate, and that the perfected final estimate was filed after the appeal had been taken, and after the demurrer had been sustained to the transcript. Is this a cause of demurrer to the transcript? If so, then the demurrer should have been sustained. If not, it was properly overruled. We are of the opinion that the objection in this case is properly taken by demurrer, for the reason that it appears that there was no right in the council to issue the precept from which the appeal was taken. In the case of *Balfe v. Johnson*, 40 Ind. 235, we attempted to show what amendments could, and what could not, be made on appeal from the precept. A proper assessment is an essential basis on which to award the precept. The making of an assessment after the issuing

Ball v. Balfe et al.

of the precept cannot relate back so as to make the precept good, or to defeat the appeal. Where an act has been properly done, and the transcript does not show such act, and for that reason a demurrer is sustained to the transcript, an amendment may, no doubt, be made so as to make the transcript show that such act was done.

The judgment is reversed, with costs, and the cause remanded.

PETTIT, C. J., having been of counsel for the appellant, was absent.

ON PETITION FOR A REHEARING.

DOWNEY, J.—In a petition for a rehearing filed in this case, it is insisted that in the amended and corrected assessment, filed as an amendment to the complaint, no change was made in the original assessment; and it is therefore claimed that the ruling of the court in the original opinion was not correct. Upon a careful examination and comparison of the two assessments, we find that counsel are mistaken in this. The amount of the assessment is the same in both assessments, but the description of the land is materially different, the description in the last assessment embracing much more land than that in the first assessment. It would not be easy to see the necessity for filing an amended assessment, if it made no change in the first assessment. But there is a material change.

The petition is overruled.

W. C. L. Taylor and *W. C. Wilson*, for appellant.

J. R. Coffroth and *T. B. Ward*, for appellees.

BALL V. BALFE ET AL.

CITY.—*Final Assessment for Street Improvement.—Common Council.*—The final estimate and assessment for a street improvement in a city may be amended or corrected by the common council.

41	221
133	258
41	221
135	152
41	221
154	486
41	221
158	211
41	221
e171	50

Ball v. Balfe et al.

SAME.—Assessment for Street Improvement.—Married Woman.—Coverture is no reason why real estate belonging to a person under such disability should not be assessed for its share of the cost of a street improvement.

SAME.—Appeal from Precept.—General Denial.—Evidence.—On an appeal from a precept issued for the collection of an assessment for a street improvement, under the general denial, the contractor must prove that the proceedings of the officers subsequent to the order directing the work to be done have been regular, that a contract was made, that the work has been done in whole or in part, according to the contract, and that the estimate has been properly made thereon.

MOTION FOR NEW TRIAL.—Evidence.—A motion for a new trial on the ground of the improper admission or exclusion of evidence should specify the evidence claimed to have been improperly admitted or rejected. It should name the document or the testimony, specifying the witness, which was improperly received or disallowed.

• **APPEAL from the Tippecanoe Common Pleas.**

• **DOWNNEY, J.**—This was an appeal from a precept issued for the collection of an assessment, made under the authority of certain proceedings of the city council of the city of Lafayette, in favor of the appellees, the contractors, against the property of the appellant. The improvement was of South street, from the Toledo, Wabash, and Western Railroad east to the Dayton gravel road. In the common pleas, there was a demurrer by the appellant to the complaint, which by law consists of the transcript, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the appellant excepted. She then answered in six paragraphs.

The first paragraph alleges, that at the commencement of the proceeding she was, and still is, a married woman, living with and supported by her husband, John Ball; wherefore, etc.

The second states that the proceeding concerns her separate real estate, and that she denies each and every allegation of the complaint; wherefore, etc.

In the third she avers that lot number nine, the property in question, borders on South street, the street a part of which was improved, and the improvement as alleged in the complaint; but that after the contract between the plaintiffs

and the city council had been made for the said improvement of South street, the acts and proceedings of the city engineer, together with the acts and doings of the plaintiffs, were irregular, oppressive, and without authority; that the city engineer, in connection with the plaintiffs, without authority, changed and sunk the former grade established by law on said street, to the depth of eight to ten feet, tore up and removed the curbing and gravel of the former improvement of said South street, from Pine street to Tenth street, bordering on said improvement; that said change of grade and the removal of the former improvement were not authorized by the city council; that the said final estimate and assessment were made so as to embrace and include the extra work done without the authority or direction of the council, and in fraud of defendant's rights assessed and charged upon lot number nine *pro rata* with others in the said final estimate and assessment, as set out in the complaint; wherefore, etc.

In the fourth paragraph, it appears that said lot number nine borders on the said improvement of said South street, as set out in the complaint and final estimate and assessment, but the defendant avers that said work or improvement was not and is not done and performed in manner and form as the said plaintiffs, in their said contract and specifications, stipulated to do; that said plaintiffs, in their pretended performance of their contract, used pit instead of screened gravel in said improvement, and failed and refused to put the quantity of gravel on the street and improvement which their contract required. The defendant further avers that said plaintiffs, with the city engineer, without authority, changed the grade of said street, and tore up and removed the former grade and improvement that had been made and established by an ordinance of the city, in the line of said South street, opposite said defendant's property, to wit, lot number nine aforesaid; and defendant avers and charges that said plaintiffs failed to complete their contract in accordance with the requirements thereof; and that the city engineer, at the

plaintiffs' instance and request, improperly charged said lot number nine with a large excess of work, together with other lots, as set out in the final estimate and assessment, not authorized or required by the common council or otherwise; wherefore, etc.

Fifth. That at the instance and request of said plaintiffs, said final estimate and assessment set out in the complaint were made so as to embrace and include the grading, gravelling, and otherwise improving of twenty feet in width of a public highway, extending from Tenth to Pine streets, as said improvement; that said public highway lies south of and outside of the south line of South street, between said points; and defendant avers that said highway was not included in the plaintiffs' contract, and that the final estimate and assessment against said lot, including said work as to that part, are void and contrary to law; wherefore, etc.

Sixth. That the final estimate and assessment described in the complaint were so made as to include and embrace a strip of ground ten feet wide, extending from Tenth to Pine streets, and lying south of and outside of the south line of said South street, and also a strip of ground thirty feet wide and two hundred and sixty-five feet long, which lies north of and adjoining the north line of said South street. And defendant avers that said final estimate and assessment include the grading, gravelling, and other portions of said improvements, as well upon said strips of ground as upon the street proper; that said work done upon said strips of ground is improperly charged and assessed against said lot number nine, and without authority of law, as set out in said estimate and assessment; wherefore, etc.

The plaintiffs demurred separately to the first, third, fourth, fifth, and sixth paragraphs of the answer, for the reason that they did not state facts sufficient to constitute a ground of defence. The court sustained all of said demurrers, and the defendant excepted. The issue formed by the general denial was tried by a jury, and there was a verdict for the plaintiffs. The defendant moved, upon written reasons, for a new

trial ; but her motion was overruled, and to this she excepted. She then moved the court in arrest of judgment ; but this motion was also overruled, and she again excepted. Thereupon the court rendered final judgment against her, from which she appealed to this court.

The errors assigned are, first, the overruling of the demurrer to the complaint ; second, sustaining the demurrers to the first, third, fourth, fifth, and sixth paragraphs of the answer ; third, overruling the motion for a new trial.

The first objection urged to the complaint is, that the common council had no power to amend or correct the final estimate and assessment made. In *The City of Indianapolis v. Patterson*, 33 Ind. 157, the members of this court were equally divided on this question. But this court has, since that time, impliedly, if not expressly, held that the final estimate and assessment may be amended or corrected. We think this is essential to the ends of justice. It may often happen that the final estimate or assessment is invalid or incorrect without any intentional wrong on the part of any one. If there can be no correction, there can be no recovery for the work done. In *Balfe v. Johnson*, 40 Ind. 235, we sanctioned the practice of making such corrections. We see no objection to the complaint. It contains the ordinance for the improvement, the engineer's specifications, notice for proposals, the award of the contract, and the contract, with the bond of the contractors, the first, second, and final estimates, and second final and corrected estimate, affidavit for precept, the precept appealed from, and the appeal bond. It is objected to it that there appears some inconsistency in the amounts of the first and the second or amended final estimates. As the second is professedly a correction of the first final estimate, we do not see the force of the fact, if it be true, that the amounts are not the same in the two, either in detail or in the aggregate.

The first paragraph of the answer alleges that the defendant was, at the commencement of the proceedings, and still

is, a married woman, living with, and supported by, her husband. The brief for appellant, with reference to this paragraph, says: "Where legal disabilities are involved, the individuality of a woman during coverture is suspended. 2 Kent Com. 181.

"This principle in our law is modified only so far as a strict construction of our statutes upon the subject will allow. In all other cases the husband must be joined with his wife, but the wife may answer separately concerning her real estate. 2 G. & H. 41, sec. 7.

"The charter of cities does not change the rule of proceedings as to husband and wife. In all proceedings to enforce a contract or liability, in which the interest of the wife is included, she and her husband are necessary parties, and should be before the court even in a proceeding *in rem*."

We do not perceive the force of this reasoning. If the position contended for is, that the husband should have been joined in the proceeding and named in the estimates and assessment with his wife, we think it cannot be sustained. If the wife see proper to unite her husband with her in the appeal, we see no objection to this course. But omitting to do so, she should not complain that he is not a party with her. If it is intended, as the answer seems to import, that the wife is not liable to pay, nor her real estate subject to sale for the amount of such assessments, we think the position is untenable.

Coverture is no reason why real estate belonging to a person under such disability should not be assessed for its share of street improvements. The liability to contribute to such improvements is general as to all property holders. The statute makes no exception in favor of married women.

As to the other paragraphs of the answer, we are of the opinion that they put in issue nothing not put in issue by the general denial of the complaint. It is conceded by counsel for the appellant that she cannot, by pleading, present and try any question of fact which arose prior to the making of the contract for the improvement. We think that under the

general denial the contractor must prove that the proceedings of the officers, subsequent to the order directing the work to be done, have been regular; that a contract was made; that the work has been done, in whole or in part, according to the contract, and that the estimate has been properly made thereon. 3 Ind. Stat. 101, sec. 71.

If, as alleged in the third paragraph of the answer, work was done not authorized by the council, and the cost of it was improperly included in the estimate and assessment; if, as stated in the fourth paragraph of the answer, the work was not done according to the contract; if the plaintiffs and the engineer, without authority from the council, changed the grade of the street; and if the costs of this unauthorized work was included in the estimate and assessment; or if, as alleged in the fifth and sixth paragraphs, work was done outside of the limits of the street, and the cost of such work was included in the estimate, all these facts might have been shown, so far as they were proper to be proved, under the general denial. They tended directly to show that the proceedings of the officers were irregular, that the work was not done according to contract, and that the estimate and assessment were not properly made. It seems to us that no good purpose will be accomplished by allowing unnecessary special pleading in these cases.

We are next to consider the questions presented by the motion for a new trial and the error assigned thereon. The grounds specified in the motion for a new trial are, first, the verdict is contrary to law; second, the verdict is not sustained by the evidence; third, error of law occurring at the trial, and excepted to at the time, first, by the court's admitting evidence to go to the jury that should have been rejected; second, by the court's excluding evidence offered by the defendant that should have been given to the jury on the trial.

We see no reason why the verdict is contrary to law.

We have examined the evidence, and think the plaintiffs introduced all the evidence, documentary and oral, necessary to justify the verdict.

Gagg et al. v. Vetter et al.

The motion for a new trial should have specified the evidence which it is claimed was improperly admitted or rejected. It should name the document or the witness and the part of his testimony which was improperly received or disallowed.

The judgment is affirmed, with costs.*

W. C. L. Taylor and *E. A. Greenlee*, for appellant.

J. R. Coffroth and *T. B. Ward*, for appellees.

*Petition for a rehearing overruled.

BALL v. BALFE ET AL.

APPEAL from the Tippecanoe Common Pleas.

OSBORN, J.—This case is, in every respect, like the case of *Ball v. Balfe*, ante, p. 221; and for the reasons given in that case, this is affirmed, with costs.

W. C. L. Taylor and *E. A. Greenlee*, for appellant.

J. R. Coffroth and *T. B. Ward*, for appellees.

GAGG ET AL. v. VETTER ET AL.

NEGLIGENCE.—*Damages.—Buildings in Cities.—Care in Construction of Chimneys, Furnaces, etc.*—Action for the destruction by fire of the plaintiff's factory building, caused by sparks from the brewery of defendant. The grounds on which a recovery was claimed were, first, that the flues, chimneys, and furnaces in defendant's brewery, being near to plaintiff's factory building, were not built in proper shape, or of sufficient height or capacity, thereby causing burning coals, soot, cinders, sparks, and embers to be carried therefrom upon the roof of the factory, whereby it was burned and destroyed; and, second, that defendant was negligent in the use of the furnaces, flues, and chimneys, by making large fires therein, of highly inflammable and dangerous material, so that the sparks, embers, etc., passed from the chimney to the roof of the factory, burning and destroying it.

41	288
124	479
126	232
127	57

Gagg et al. v. Vetter et al.

The defendant's brewery was built in a populous part of a large and rapidly increasing city. The property of the plaintiff, which was destroyed by the fire, was there at the time the brewery was constructed.

Held, that this imposed upon the defendant the necessity of exercising a higher degree of care and diligence in the construction and management of his brewery than if it had been located in the country, or in a part of the city where there were no houses in its immediate vicinity; that a mere difference of opinion among men of science and experience, as to the best plan to construct the chimney, furnace, and flues, did not justify the selection of any well supported theory without further inquiry; for the defendant was bound to use all due care and vigilance to ascertain which theory was correct, and which incorrect; and for that purpose he was bound to avail himself of all the discoveries which science and experience had put within his reach; that while the law does not require absolute scientific perfection in the construction of such works, it does require the exercise of a high degree of care and skill to ascertain, as nearly as may be, the best plan for such structures; and it requires that not only skilful and experienced workmen shall be employed in their construction, but that due skill shall be exercised by such workmen in the particular instance; that the defendant was liable in damages to the extent of the injury sustained by the plaintiff, if it was proved upon the trial, either that ordinary care and diligence were not employed in the construction of the chimney, furnaces, and flues, or that he was guilty of negligence in the management thereof, and that the factory building was destroyed from either of these causes.

EVIDENCE.—*Questions of Fact from Scientific Sources before Jury.*—*Finding.* *Rule upon Appeal.*—Where a question before a jury is dependent for its solution upon philosophical principles and mechanical skill and judgment, this court on appeal is as much bound to respect the conclusions of the jury as in any other case.

NEGLIGENCE.—*Question of Law and Fact.*—The question of negligence is one of mingled law and fact, to be decided as a question of law by the court, when the facts are undisputed or conclusively proved, but not to be withdrawn from the jury when the facts are disputed and the evidence is conflicting.

SAME.—*Instruction.*—It was proper for the court, in said action, to admit evidence to prove that smoke, sparks, and flame had been seen coming out of the top of the chimney at other times than on the occasion of the injury complained of, and to instruct the jury that it was proper for them to consider and weigh such evidence, in determining whether the chimney and smoke-stack had been properly constructed.

BILL OF EXCEPTIONS.—*Evidence.*—*Jury Viewing Premises.*—The fact that the jury were conducted by the bailiff to inspect the premises, chimneys, etc., of defendant's brewery, did not prevent this court from regarding the bill of exceptions as containing all the evidence.

APPEAL from the Marion Circuit Court.

Gagg et al. v. Vetter et al.

BUSKIRK, J.—The appellees, who were the plaintiffs below, by their complaint aver, that Anna Vetter was the owner, in her own right, of a certain lot in the city of Indianapolis, on which was erected a frame building, used by her husband as a furniture factory, and in which was a large amount of machinery, tools, fixtures, etc., the whole of the value of ten thousand dollars; that the appellants were in the possession of the lots and premises contiguous to said factory, and did thereon erect buildings, chimneys, furnaces, smokestacks, and other structures, for the purpose of carrying on the business of brewing malt liquors; that appellees were using their said premises as a furniture factory at the time appellants erected their said works for the purposes aforesaid; that appellees' factory was covered with shingles, which appellants at the time well knew; that appellants, in the use of their buildings, furnaces, etc., consumed large quantities of fuel, and kept up large fires; that their said furnaces, flues, and chimneys were so located and built as to endanger the safety of appellees' property while using the same; "that said flues, furnaces, and chimneys of appellants were located and constructed in an insufficient, careless, and negligent manner, not being built of proper shape, nor of sufficient height or capacity, so that when the same were in use by appellants, the burning sparks, soot, coals, embers, and cinders from said furnaces, flues, and chimneys fell around and upon the buildings of appellees, of which appellants had notice; that on the 26th of April, 1867, while the appellants were using their furnaces, flues, and chimneys, and while keeping up and maintaining fires therein and thereunder, they did use, manage, and control the same in a negligent, reckless, and unskilful manner, and did make large fires therein of highly inflammable and dangerous material, so that, by reason of the improper, unskilful, insufficient, and dangerous location and construction of said flues, furnaces, and chimneys, and the careless, negligent, reckless, and unskilful use and management thereof by appellants, burning coals, soot, sparks, embers, and cinders were carried there-

from on to the factory buildings of appellees, so that said buildings, by the said negligence and recklessness of appellants, and without any fault of appellees, were fired and consumed."

Appellants demurred to complaint, and assigned for cause that the same did not state facts sufficient to constitute a good cause of action. Demurrer overruled. Appellants excepted. Answer of appellants, general denial. This cause was tried by jury. Trial of cause commenced January 3d, and concluded January 27th, 1870, when the jury returned a verdict, as follows: "We, the jury, find for the plaintiffs, and assess the damages of the plaintiff Anna Vetter at five thousand two hundred and fifty dollars."

The court, upon its own motion, instructed the jury in writing, as follows:

"1. The plaintiffs bring this suit for damages they allege resulted to the property of the plaintiff Anna Vetter from fire, communicated to it from the chimneys or smoke-stacks of the defendants' brewery, the plaintiffs alleging that from the dangerous location, and careless, defective construction of such chimneys or smoke-stacks, and careless and negligent use of said chimneys and stacks, in having great fires made of highly inflammable and dangerous material in the furnaces leading to said chimneys or smoke-stacks, so that fire was carried from the top of the same to the plaintiff's building, whereby it was set on fire and consumed, without any fault or negligence on the plaintiff's part. The defendants deny these allegations, which puts the plaintiff upon the proof of every material charge in her complaint.

"2. Under the issues in this case, your first inquiry should be, was the building of the plaintiff Anna Vetter set on fire by sparks, coals, soot, embers, or cinders, carried from the chimneys or smoke-stack of the defendants' brewery? If the plaintiffs fail to establish this point, by a fair preponderance of evidence, then, without further consideration, your verdict should be for the defendants. But should this point be established by such preponderance, then you should go

further and inquire, first, whether the fire was caused by the use of a chimney or smoke-stack, or both, which was dangerously located, or negligently, or defectively constructed; or, second, if such chimney or smoke-stack was properly located and constructed, whether the fire was caused by the careless and negligent use by the defendants of such chimney or smoke-stack?

"3. First, then, as I have suggested, you should inquire, was the fire caused by the use of a defectively constructed chimney or smoke-stack, or the furnaces or flues leading to the same, as named in the complaint? In investigating the question of the construction of the chimney or smoke-stack, you may properly take into consideration the action of the stack or chimney as to the delivery of fire or sparks at other times, whether such delivery was occasional or frequent. So, also, you may take into consideration the opinion of experts, persons who have experience in such matters, and also those who have had opportunities of observing the action of the chimney or stack in its ordinary action and operation. The law does not demand absolute scientific perfection in the construction of such works, but only that ordinary degree of skill in such construction which mechanics versed in works of the kind ordinarily used. But such works should be built with reference to the safety of adjoining premises, as well as to the mere convenience of the persons using them, taking into consideration the distance from the chimney to such adjoining premises, the height of the adjoining buildings, and all the other surrounding circumstances. This question of skill in construction extends to the construction of the flues and construction of the furnaces and flues, and the same question of ordinary skill applies. The law does not hold persons responsible for not making possible improvements, but only such as the experience of men versed in such matters recommends, and as are actually in existence.

"4. Were, then, the flues and the chimney or smoke-stack constructed with the ordinary degree of care and skill I have named? If not, and the injury complained of resulted from

such want of care and skill in construction, and, further, was the natural or probable consequence of such want of care and skill in construction, according to the ordinary experience of men, then the defendants will be liable. But if the chimney or stack, and the flues leading to the same, were constructed with ordinary care and skill, with a prudent regard to the safety of adjoining property, under the circumstances of distance and height, then you should inquire further, whether the burning of the plaintiff's building was caused by the negligent and careless use of the chimney or stack, or the furnaces and flues communicating with it.

"5. Your investigation of this point of negligent use is confined to the time charged in the complaint, that is to say, to the time of the origin of the fire complained of; this, as charged in the complaint, and as appears in evidence, was on or about the 26th of April, 1867. Even if there was negligent use at other times, before or after, yet the plaintiffs are none the less bound to sustain their charge of negligent use at this special time, by a fair preponderance of evidence, than if there had never, at any other time, been any negligent use.

"6. The defendants were bound to use their furnaces, flues, and chimneys with ordinary care and skill. What constitutes ordinary care and skill depends upon the circumstances of the particular case; such care as a reasonable, prudent man would exercise upon the particular occasion would be such ordinary care as the law requires. This care depends upon the degree of danger to be avoided. Where the danger of injury to others is imminent, and the means of avoiding it wholly within the power of the party whose care is required, a higher degree of care is required than in circumstances of less danger, and a failure to use it would amount to a want of ordinary care under the circumstances. But unless, as I have previously suggested, the injury was the natural or probable consequence of the conduct upon the special occasion, according to the ordinary experience of men, the party would not be chargeable.

"7. If you find, then, the plaintiff's building was set on fire by the failure of the defendants to exercise ordinary care, as I have defined it, in the use of the chimney or stack, and the furnaces and flues connected therewith, then your verdict should be for the plaintiffs.

"8. To entitle the plaintiffs to a verdict, there must be a clear, fair preponderance of evidence in support of their allegations, either that the fire resulted from the careless and unskilful construction of the chimney or smoke-stack, or the furnaces and flues connected therewith, or from the use of the chimney or stack by the want of ordinary care and skill, as I have defined, or from both these causes combined.

"9. If the evidence is evenly balanced, in your judgment, or if it preponderates in favor of the defendants, then your verdict should be for the defendants."

The appellants, at the time of giving said instructions, and before the retirement of the jury, as to the giving of each of said instructions objected and excepted.

Appellants moved the court to set aside the verdict and grant a new trial, and assigned the following grounds and causes therefor:

1. The verdict is not sustained by sufficient evidence.
2. The verdict is contrary to law.
3. The court erred in first of its instructions to the jury.
4. The court erred in second of its instructions to the jury.
5. The court erred in third of its instructions to the jury.
6. The court erred in fourth of its instructions to the jury.
7. The court erred in fifth of its instructions to the jury.
8. The court erred in sixth of its instructions to the jury.
9. The court erred in seventh of its instructions to the jury.
10. The court erred in eighth of its instructions to the jury.
11. The court erred in its instructions to the jury.
12. The court erred in admitting evidence to the jury, over defendants' objections, as excepted to at the time.

13. The court erred in rejecting testimony offered by defendants, as excepted to at the time.

14. The court erred in admitting so much of the testimony of witnesses, George M. Bishop, Charles Steigman, Fred Stuckman, Mrs. Dunbar, James Karl, John J. Vetter, Nancy Dunbar, Elizabeth Drots, Lewis Karl, Emil Drots, Mrs. Kolb, and Anna Vetter, and each of them, to the effect that the chimney emitted sparks and fire at other times, before and after the time complained of in the complaint, over the objection of the defendants, to which the defendants at the time excepted.

Motion overruled, and excepted to by appellants.

Judgment rendered on the verdict, to which the appellants at the time excepted and objected.

There are sixteen assignments of error. The first fourteen assignments are mere repetitions of the reasons for a new trial, and are embraced by the fifteenth, which is based upon the action of the court in overruling the motion for a new trial. The sixteenth assignment presents no question in this case that is not presented by the fifteenth assignment of error. The only question presented for our decision is, whether the court erred in overruling the motion for a new trial.

The plaintiffs below, and the appellees here, base their right to recover in this action upon two grounds, and they are:

First. That the flues, chimneys, and furnaces in appellants' brewery, being near to appellees' factory building, were not built in proper shape, nor of sufficient height or capacity, causing burning coals, soot, cinders, sparks, and embers, to be carried therefrom upon the roof of the factory, whereby it was burned and destroyed; and,

Second. That appellants were negligent in the use of the furnaces, flues, and chimneys, by making large fires therein, of highly inflammable and dangerous material, so that the sparks, embers, etc., passed from the chimney to the roof of the factory, burning and destroying it.

Gagg et al. v. Vetter et al.

The learned counsel for appellants have, in their brief, maintained that the appellees cannot recover upon the first ground stated for the following reasons:

"If in the erection of large and costly structures, important to the development of the country, there arise questions involving philosophical and mechanical principles upon which men of skill and experience differ—such as the proper sizes of furnaces, capacities of flues, and height of chimneys—can it be said to be an act of carelessness or negligence, or wrong, that either or any well supported theory and plan be adopted? We submit, as a question of law, that in such case there can be no liability, even if the decision be unfortunate. This doctrine is essential to the development of the mechanic arts in our country. In such cases the courts will not allow men of enterprise to be destroyed by verdicts, in the absence of wilful disregard of the rights of others.

"We submit further, that in the erection of useful and difficult structures, the parties cannot be charged with negligence or wrong, if they employ the most skilled labor they can command, even if the work prove defective; for they have exercised all the care and diligence possible, and a verdict cannot stand in hostility to this proposition. The construction of the furnaces under the large kettles, and the flues connected therewith in appellants' brewery, was a work of much difficulty, and but few mechanics had the skill to accomplish it. The appellants secured the best workmen they could obtain."

The position of counsel for appellants, as we understand it, is, that if men of skill and experience differ as to the proper and best mode and plan of erecting large and difficult structures, such as the proper sizes of furnaces, capacities of flues, and heights of chimneys, the person who adopts any well supported theory or plan cannot be charged with carelessness, negligence, or wrong, although the decision made was unfortunate, and the plan adopted was not the best which might have been adopted; and that if such person employs, in the construction of such structures, the most

skilled labor which he can command, he cannot be charged with negligence or wrong, although the work may prove defective.

In support of the above position, we have been referred to the following authorities: Shearman and Redfield Negligence, 506; *Weightman v. The Corporation of Washington*, 1 Black, 39; *Ryan v. New York Central R. R. Co.*, 35 N. Y. 210; *Lapham v. Curtis*, 5 Vt. 371; *The P., Ft. W. & C. Railway Co. v. Gilleland*, 56 Pa. St. 445.

The law is stated as follows by Shearman and Redfield:

"If one uses every precaution which the present state of science affords, and which a reasonable man would use under the circumstances, he is not held responsible for omitting other precautions which are conceivable; even though, if he had used them, the injury would certainly have been avoided. So, if he uses all the skill and diligence which can be attained by reasonable means, he is not responsible for failure. * * * * * Regard is to be had, in judging of negligence, to the growth of science, and the improvement in the arts, which take place from generation to generation; and many acts or omissions are now evidence of gross carelessness, which a few years ago would not have been culpable at all, as many acts are now consistent with great care and skill, which in a few years will be considered the height of imprudence." Shearman and Redfield Negligence, 5.

In our opinion, the above authority does not support the position assumed. The law is stated to be, "If one uses every precaution which the present state of science affords, and which a reasonable man would use under the circumstances, he is not held responsible for omitting other precautions which are conceivable."

The case of *Weightman v. The Corporation of Washington*, *supra*, was an action to recover damages for personal injuries received by the plaintiff by the falling of a bridge which the city was bound to maintain. The defence was, that the bridge was built by skilful men, and upon a plan ap-

Gagg et al. v. Vetter et al.

proved by scientific persons, and that the corporation had no notice of any defect, or of its being out of repair. The case mainly turned upon whether the corporation was bound by its charter to keep the bridge in question in repair, and whether the corporation had notice that it was out of repair. The court, after enumerating certain powers which are granted to municipal corporations, which are undefined and discretionary, say: "But the duties arising under such grants are necessarily undefined, and, in many respects, imperfect in their obligation, and they must not be confounded with the burdens imposed, and the consequent responsibilities arising, under another class of powers usually to be found in such charters, where a specific and clearly-defined duty is enjoined in consideration of the privileges and immunities which the act of incorporation confers and secures. Where such a duty of general interest is enjoined, and it appears, from a view of the several provisions of the charter, that the burden was imposed in consideration of the privileges granted and accepted, and the means to perform the duty are placed at the disposal of the corporation, or are within their control, they are clearly liable to the public if they unreasonably neglect to comply with the requirement of the charter; and it is equally clear, when all the foregoing conditions concur, that, like individuals, they are also liable for injuries to person or property arising from neglect to perform the duty enjoined, or from negligence and unskilfulness in its performance."

The case of *Ryan v. New York Central R. R. Co.*, 35 N. Y. 210, was a case where fire was communicated by an engine to a wood-shed of the company, and from that to the plaintiff's house. It was held that the damages were too remote, and that there could be no recovery.

But the court lays down a principle of law that has some bearing on the present case. It is said: "So if an engineer on a steamboat or locomotive, in passing the house of A., so carelessly manages the machinery that the coals and sparks from its fires fall upon and consume the house of

A., the railroad company or steamboat proprietors are liable to pay the value of the property thus destroyed. *Field v. The New York Central Railroad*, 32 N. Y. 339. Thus far the law is settled and the principle apparent." The distinction between that case and the case at bar is clearly put by the court in this further extract: "I prefer to place my opinion upon the ground that, in the one case, to wit, the destruction of the building upon which the sparks were thrown by the negligent act of the party sought to be charged, the result was to have been anticipated the moment the fire was communicated to the building; that its destruction was the ordinary and natural result of its being fired. * * But that the fire should spread and other buildings be consumed, is not a necessary or an usual result."

The case of *Lapham v. Curtis*, *supra*, was an action by the owners of a furnace which was situated below a mill-dam and pond owned by the defendant, to recover damages for injuries done to the furnace by an overflow of water, which was alleged to have been caused by the defective, negligent, and unskilful manner in which such dam had been constructed, and in which repairs thereto had been made. The court held that the owner of the dam had a prescriptive right to maintain such dam, and that he had the right to make repairs thereto, and then proceeded to define the care and diligence which he was required to use in making such repairs, as follows:

"But the defendant was subject to the maxim, *sic utere tuo ut alienum non lædas*. To comply with this requisition of the common law, it was the duty of the defendant to have used ordinary care and diligence in making repairs to his dam; or in drawing off the water from his pond, to prevent injuries to the plaintiffs' furnace. If the defendant did not use this care and diligence, he was guilty of negligence, and liable for consequential damages; but he was not liable for inevitable accidents."

The case of *The Pittsburg, Fort Wayne, and Chicago Railway v. Gilleland*, 56 Pa. St. 445, was an action by the ap-

Gagg et al. v. Vetter et al.

pellee, the owner of land through which appellant's road passed, to recover damages for an injury caused to his land by the continuance, after notice, of an insufficient culvert, so unskilfully and negligently constructed by the former proprietors of the road as not to vent all the water that flowed down the channel, over which it was built, in the ordinary seasons of high water. The action was founded upon the duty of a railroad company to construct its works with proper skill and care, and with a due regard to the features of the ground over which its road passes.

It was contended by the appellant that the injury from an insufficient culvert fell within the special authority given for the appropriation of the land and the damages arising therefrom. The court, after considering and deciding such question against the appellant, proceeded to consider and determine the common law liability of the railroad company. The court said: "And on this point there is no doubt, upon general principles and adjudicated cases. The entry of a company to build its railroad being lawful, it stands as if it were on its own ground, and the maxim applies, *sic utere tuo ut alienum non lædas*. It should so perform its act as not to carry over its injurious consequences beyond the hurt it may lawfully inflict. It is said in Hilliard on Torts, 125, and numerous examples are there adduced, that acts innocent and lawful in themselves may become wrongful when done without a just regard to the rights of others, and without suitable reference to the time, place or manner of performing them. The test of exemption from liability for injury arising from the use of one's own property is said to be the legitimate use or appropriation of the property in a reasonable, usual, and proper manner, without any unskilfulness, negligence or malice. *Carhart v. Auburn Gaslight Co.*, 22 Barb. 297. The distinction is vital, says THOMAS, J., in *Rockwood v. Wilson*, 11 Cush. 221, for nothing is better settled than that if one do a lawful act upon his own premises, he cannot be held responsible for injurious consequences that may result from it, unless it was so done as to constitute actiona-

ble negligence. But lawful acts may be performed in such a manner, so carelessly, negligently, and with so little regard to the rights of others, that he who, in performing them, injures another, must be responsible for the damage. *Burroughs v. The Housatonic Railroad Co.*, 2 Am. R. Cas. 35."

While the foregoing authorities have an important bearing upon the principal question in the case, they do not, in our judgment, support the positions assumed by counsel for appellants.

Addison on Torts, 242, states the law as follows: "Whenever it is practicable to adopt precautions that will render damage by fire from a furnace 'next to impossible,' a failure to adopt those precautions will be negligence. Where a spark of fire from the chimney of a locomotive engine on a railroad fell on the thatch of a cart-lodge, and set it on fire, and the fire communicated to several other farm buildings, and totally destroyed them, it was held that the very occurrence of the disaster was, *prima facie*, proof of negligence on the part of the company and their servants having the management of their engine, rendering it incumbent on them to show that every possible precaution had been taken to prevent the escape of sparks."

The following authorities are referred to by the author: *Piggot v. Eastern Counties R. W. Co.*, 3 C. B. 229; *Aldridge v. Great Western Railway Co.*, 3 Man. & G. 515; *Fremantle v. London and North Western Railway Co.*, 10 C. B. N. S. 89; 31 Law J. C. P. 12; 2 F. & F. 337; *Vaughan v. Taff Vale Railway Co.*, 3 H. & N. 743; 28 Law J. Exch. 41; 29 Law J. Exch. 247; 5 H. & N. 679.

In *Fremantle v. The London and North Western Railway Co.*, *supra*, it was said: "It must, therefore, be considered what would be negligence on the part of the defendants, for the consequences of which they ought to be held responsible. That, as to that, the defendants, in the construction of their engines, were bound, not only to employ all due care and all due skill for the prevention of mischief occurring to the

Gagg et al. v. Vetter et al.

property of others, by the emission of sparks, or any other causes, but they were bound to avail themselves of all the discoveries which science had put in their reach for that purpose, provided that they were such as, under the circumstances, it was reasonable to require them to adopt."

In *Vaughan v. Taff Vale Railway Co.*, *supra*, it was held by the Exchequer Chamber, that a railway company is not responsible for an accidental fire caused by a spark falling from one of their engines upon premises adjoining the railway, if they have taken every precaution that science can suggest to prevent injury.

It was held, in *The Illinois Central R. R. Co. v. McClelland*, 42 Ill.355, that a railroad company, by failing to provide the most approved appliances for arresting sparks from their engines, becomes liable for all casualties occasioned thereby.

In *Fero v. The Buffalo, etc., R. R. Co.*, 22 N. Y. 209, it was said: "The train was running at the usual rate of speed, in the open country, and it was shown that the engine was of the most approved construction; the spark-arresters of the best pattern; and that a suitable police had been provided upon the road for the purpose of following trains and looking after fires." These circumstances were held sufficient to discharge the defendants from liability for the damages which were supposed to have been occasioned by flying sparks from the engine.

In *Kelsey v. Barney*, 2 Kern. 425, JOHNSON, J., in speaking of the degree of care required, says, in his opinion, that under some circumstances, a very high degree of vigilance is demanded, even under the requirements of ordinary care. "Where," he says, "the consequence of negligence will probably be serious injury to others, and where the means of avoiding the infliction of injury upon others are completely within the party's power, ordinary care requires almost the utmost degree of human vigilance and foresight."

In *Folnson v. The Hudson River R. R. Co.*, 20 N. Y. 65, the court held, that "they were bound to exercise the utmost care and diligence; and for the purpose of avoiding acci-

Gagg et al. v. Vetter et al.

dents, endangering property and life, were bound to use all the means and measures of precaution that the highest prudence could suggest, and which it was in their power to employ."

In *Hegeman v. The Western Railroad Corporation*, 3 Kern. 9, the company was held liable for injury resulting from the breaking of the axle of the car. On the part of the defendant, it was proved that the track of the railroad was in good order, and that the train was manned by a competent and skilful conductor, engineer, and brakemen; that at the time of the accident, the train was going at the rate of from twenty-five to thirty miles per hour, being the ordinary speed of passenger trains; and when the accident occurred, the employees of the defendant were at their appropriate places, and the train was stopped as soon as possible after the axle broke. The conductor, who was in charge of the train at the time, testified that the car which broke had been run upon the road about sixteen months; that it was new when it came into the train; that it was built at Springfield, by The Springfield Car and Engine Company; that it was an excellent car, and was used only during the summer months, as they did not wish to deface it by putting stoves in it.

It was very earnestly insisted by learned counsel in the Court of Appeals, that under the circumstances stated the company was not liable; but the judgment of the court below was affirmed. The court say: "It was said that carriers of passengers are not insurers. This is true. That they were not required to become smelters of iron, or manufacturers of cars, in the prosecution of their business. This also must be conceded. What the law does require is, that they shall furnish a sufficient car to secure the safety of their passengers, by the exercise of the 'utmost care and skill in its preparation.' They may construct it themselves, or avail themselves of the services of others; but in either case, they engage that all that well-directed skill can do has been done for the accomplishment of this object. A good reputation upon the part of the builder is very well in itself, but ought

Gagg et al. v. Vetter et al.

not to be accepted by the public, or the law, as a substitute for a good vehicle. What is demanded, and what is undertaken by the corporation, is not merely that the manufacturer had the requisite capacity, but that it was skilfully exercised in the particular instance. If to this extent they are not responsible, there is no security for individuals or the public."

The case of *The Terre Haute, etc., R. R. Co. v. McKinley*, 33 Ind. 274, was an action by the appellee against the appellant, to recover damages for overflowing his lands, which was alleged to have been caused by an insufficient and defective culvert upon the lands of the plaintiff.

The defence of the company was placed upon the ground that the new culvert was necessary to the safety of passengers and property passing over the road, and that it was built with care, skill, and prudence. The court below refused to so charge the jury. This court, for that error, reversed the judgment. The court say: "The jury ought to have been plainly charged, so far as the injury from overflowing the lands of the plaintiff by the construction of the embankment and abutment was concerned, that if they found, from the evidence, that the embankments and abutments were necessary to the safety of passengers and property passing over said road, and that it was built, constructed, and erected, with care, skill, and prudence, not only as to safety of persons and property passing over the road, but also for the protection and safety of the property holder, then the finding on that issue should be for the defendant."

In the above case, the main point of controversy was, whether the aperture was large enough to carry off the water. Upon that point a number of scientific witnesses were examined, who differed widely in their views. There was also much evidence as to the skill and experience of the workmen who put up the work. In our opinion, this court placed its decision upon reasonable and solid ground, and that was, that if the new structure was necessary for the safety of passengers and property passing over the road, and

if the same was built with care, skill, and prudence, and with a due regard to the protection and safety of the property holder, the company was not liable, and that these questions should have been submitted to the jury.

In our opinion, it would be a very unsafe and dangerous rule to hold that a builder might adopt any well-supported theory as to the proper and best plan and mode of constructing large and difficult structures, and that if he employed workmen of skill and experience, he could not be charged with carelessness or negligence, if such plan should prove defective and such work should be unskillfully performed.

We know, from experience and observation, that men of skill and experience entertain radically different views upon questions of science and skill, and support their conflicting theories with ingenuity and plausibility, even after experience and observation have demonstrated their falsity and fallacy; and in like manner we know that some workmen of undisputed reputation for experience and skill perform their work in a careless and unskillful manner.

The appellants' brewery was built in a populous part of a large and rapidly increasing city. The property of the appellees, which was destroyed by the fire, was there at the time the brewery was constructed. This imposed upon the appellants the necessity of exercising a higher degree of care and diligence in the construction and management of their brewery than if it had been located in the country, or in a part of the city where there were no houses in its immediate vicinity. A mere difference of opinion among men of science and experience as to the best plan to construct the chimney, furnace, and flues did not justify the selection of any well-supported theory without further inquiry, for they were bound to use all due care and vigilance to ascertain which theory was correct and which was incorrect; and, for that purpose, they were bound to avail themselves of all the discoveries which science and experience had put within their reach. While the law does not require absolute scien-

Gagg et al. v. Vetter et al.

tific perfection in the construction of such works, it does require the exercise of a high degree of care and skill to ascertain, as near as may be, the best plan for the structures; and it requires not only that skilful and experienced workmen shall be employed in their construction, but that due skill was exercised in the particular instance.

We are aware that a higher degree of care and diligence is required on the part of common carriers toward passengers than in ordinary cases, and some of the above cases may have laid down a rule of strictness that would not be applicable to the case under consideration. In the present case, the defendants were required, in the adoption of the plan and in the construction of their chimney, flues, and furnaces, to exercise ordinary care, prudence, and foresight; that is, such a degree of care and attention as experience has found reasonable and necessary to prevent injury to others in like cases.

This is what is understood by the terms, "ordinary care and diligence."

The liability of the defendants in this action was placed upon this ground. The court below instructed the jury that, "the law does not demand absolute scientific perfection in the construction of such works, but only that ordinary degree of skill in such construction which mechanics, versed in works of the kind, ordinarily used."

It is also maintained by counsel for appellants that the appellees ought not to recover in this action, from the circumstance that no such action as the present has ever been sustained in any of the courts of this country, and in support of such position, quote the following language from the opinion of the court in the case of *Ryan v. The New York Central R. R. Co.*, *supra*: "That the defendant is not liable in this action may also be strongly argued, from the circumstance that no such action as the present has ever been sustained in any of the courts of this country, although the occasion for it has been frequent and pressing. Particular instances are familiar to all, where such claims might have been made with propriety. The instance of the Harpers, occurring a

few years since, is a striking one. 23 N. Y. 441. Their large printing establishment, in the city of New York, was destroyed by the gross carelessness of a workman, in throwing a lighted match into a vat of camphene. The fire extended, and other buildings and much other property was destroyed. The Harpers were gentlemen of wealth, and able to respond in damages to the extent of their liability. Yet we have no report in the books, and no tradition, of any action brought against them to recover such damages."

The above quoted language is not applicable to the present case, for the reason that the fire, which came out of the defendants' chimney, dropped upon the property of the plaintiffs' and set it on fire, while in that case the wood-shed of the company was set on fire by sparks from the engine, and the plaintiff's house, situated at a distance of one hundred and thirty feet, took fire from the heat and sparks and was consumed. The ruling of the court in that case was placed upon the ground that the damages sustained by the plaintiff were too remote. HUNT, J., speaking for the court, says: "My opinion, therefore, is, that this action cannot be sustained, for the reason that the damages incurred are not the immediate but the remote result of the negligence of the defendants. The immediate result was the destruction of their own wood and sheds; beyond that, it was remote." In further proof of the fact that the language quoted does not apply to the present case, we again quote from the above case the following language: "So if an engineer upon a steamboat or locomotive, in passing the house of A., so carelessly manages its machinery that the coals and sparks from its fires fall upon and consume the house of A., the railroad company or the steamboat proprietors are liable to pay the value of the property thus destroyed."

But conceding that the above language applies to the present case, the question arises as to the meaning to be attached to the expression, "No such action as the present has ever been sustained in any of the courts of this country." If by the phrase, "no such action," is meant no action

Gagg et al. v. Vetter et al.

founded upon, and governed by, any of the known and well-settled principles of the law, then the objection is entitled to great weight and consideration, for the courts of this country do not possess the power to make law, but their functions are confined to the exposition of the law as it is, and its application to the facts of each new case, as it shall arise in the administration of justice. The law consists of rule, of reason, of legal principles, and not of mere points as presented in particular cases. If, however, by the words, "no such action," is meant that no action is based upon the same identical state of facts, then the question ceases to be one of difficulty or importance.

The wide and marked difference between the general principles of the law, and the points as presented in particular cases is stated with great accuracy, clearness, and force, by Mr. Chief Justice SHAW, in *Norway Plains Co. v. Boston and Maine Railroad*, 1 Gray, 263, where he says: "It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it. These general principles of equity and policy are rendered precise, specific, and adapted to practical use, by usage, which is the proof of their general fitness and common convenience, but still more by judicial exposition; so that, when in a course of judicial proceeding, by tribunals of the highest authority, the general rule has been modified, limited and applied, according to particular cases, such judicial exposition, when well settled and acquiesced in, becomes itself a precedent, and forms a rule of law for future cases, under like circumstances. * * * * *

The consequence of this state of the law is, that when a

new practice or new course of business arises, the rights and duties of parties are not without a law to govern them; the general considerations of reason, justice, and policy, which underlie the particular rules of the common law, will still apply, modified and adapted, by the same considerations, to the new circumstances. If these are such as give rise to controversy and litigation, they soon, like previous cases, come to be settled by judicial exposition, and the principles thus settled soon come to have the effect of precise and practical rules. Therefore " (applying these observations to the case before the court), "although steamboats and railroads are but of yesterday, yet the principles which govern the rights and duties of carriers of passengers, and also those which regulate the rights and duties of carriers of goods, and of the owners of goods carried, have a deep and established foundation in the common law, subject only to such modifications as new circumstances may render necessary and mutually beneficial."

We proceed to inquire whether the facts and circumstances of the case before the court bring it within any of the well-settled principles of the common law; and in determining such question we will be guided by elementary principles and judicial expositions.

There is an elementary and fundamental principle of law, which is based upon, and is coeval with, the right to own and control property, that a man must so use his own rights and property as to do no injury to those of his neighbor; for in all civil acts the law does not so much regard the interest of the actor as the loss and damage of the party suffering. *Saunders Negligence*, 61.

The above is one of the broad and comprehensive principles of the law spoken of by SHAW, C. J., *supra*, and there have been in England and in this country many judicial expositions of such principle, making an application thereof to the facts and circumstances of particular cases, thus establishing precedents which become a rule of law for future cases.

Gagg et al. v. Vetter et al.

It has accordingly been held, that every person who occupies land, who allows wells or mining shafts to remain on his land unguarded and unprotected, is responsible in damages to all persons who sustain injury from falling into them, provided they were lawfully traversing the land on which the shaft or well existed, and fell into it without any negligence or misconduct on their part; but if, however, they were at the time trespassers on the land, they would not be entitled to maintain the action. *Hardcastle v. The South Yorkshire R. W. Co.*, 4 H. & N. 67; 28 L. J. Exch. 137; *Blyth v. Topham*, 4 Cro. Jac. 158; *Hounsell v. Smyth*, 7 C. B. N. S. 731; 29 L. J. C. P. 203; *Gautret v. Egerton*, 36 L. J. C. P. 191; *Corby v. Hill*, 4 C. B. N. S. 556; 27 L. J. C. P. 318; *Gallagher v. Humphrey*, 6 Law Times, 684; *Groucott v. Williams*, 4 Best & S. 149; 32 L. J. Q. B. 237; *Howland v. Vincent*, 10 Met. 371; *Bush v. Brainard*, 1 Cowen, 78.

In *Lee v. Riley*, 18 C. B. N. S. 722; 34 L. J. C. P. 212, it appeared that through the defect of a gate, which the defendant was bound to repair, his horse got out of his farm into an occupation-road, and strayed into the plaintiff's field, where it kicked the plaintiff's horse; and it was held, that the defendant was liable for the trespass by his horse, and that it was not necessary, for the maintenance of the action, to prove that the defendant's horse was vicious, and that the defendant was aware of it; also, that the damage the plaintiff had sustained by the injury to his horse was not too remote, but was sufficiently the consequence of the defendant's neglect to be recoverable.

Gale on Easements, 335, in speaking of the support of land, says: "If every proprietor of land was at liberty to dig and mine at pleasure on his own soil, without considering what effect such excavations must produce upon the land of his neighbors, it is obvious that the withdrawal of the natural support would, in many cases, cause the falling in of the land adjoining. * * * The negation of this principle would be incompatible with the very security for property, as it is obvious that if the neighboring owners

might excavate their soil on every side up to the boundary line to an indefinite depth, land thus deprived of support on all sides could not stand by its own coherence alone."

It has been held, that if the owner of a house which is being pulled down, conducts the work in so irregular, negligent, and improper a manner that injury is produced thereby to the adjoining house, he will be liable to make compensation in damages for the consequences of his want of caution. *Walters v. Pfeil*, Moody & M. 362; *Dodd v. Holme*, 1 Ad. & E. 493.

It has been held in many cases, that a person engaged in building is responsible for injuries caused by defective scaffolding, where due care has not been used. Hay Accidents & Negligence, 121.

It has been repeatedly held that the owners of coal pits, blast furnaces, rolling mills, and manufactures generally, are liable for injuries caused by defective machinery, where proper care has not been used. Hay Accidents & Negligence, 130, *et seq.*

It was held, in *Hewey v. Nourse*, 54 Maine, 256, that "every person has a right to kindle a fire on his own land for the purposes of husbandry, if he does it at a proper time, and in a suitable manner, and uses reasonable care and diligence to prevent its spreading and doing injury to the property of others. The time may be suitable and the manner prudent, and yet if he is guilty of negligence in taking care of it, and it spreads and injures the property of another, in consequence of such negligence, he is liable in damages for the injury done. The gist of the action is negligence, and if that exists in either of these particulars, and injury is done in consequence thereof, the liability attaches; and it is immaterial whether the proof establishes gross negligence, or only a want of ordinary care, on the part of the defendant."

To the same effect are the cases of *Bachelder v. Heagan*, 18 Maine, 32; *Barnard v. Poor*, 21 Pick. 378; *Tourtellot v. Rosebrook*, 11 Met. 460.

In *Teall v. Barton*, 40 Barb. 137, the defendants were

Gagg et al. v. Vetter et al.

engaged, under a contract with the state authorities, in removing a sunken boat from the channel of the canal, by means of a steam dredging machine, in the vicinity of the plaintiff's buildings, using wood for fuel, without any spark-catcher or screen upon their smoke-stack. A high wind blowing the sparks and cinders to and over the farm buildings, the defendants were notified by the plaintiff's agent or servant of the danger to such buildings; notwithstanding which, the defendants continued to use their dredge, keeping up the fire thereon without putting on a spark-catcher, or using any extra precaution to prevent injury from fire. The buildings of the plaintiff being consumed by fire communicated to a pile of straw by sparks, it was held that the defendants were guilty of carelessness and negligence, and were liable for the damages occasioned by the fire.

The case of *The Steamboat New World v. King*, 16 How. U. S. 469, was an action for damages occasioned by the explosion of a boiler, alleged to have been caused by the want of care and skill on the part of the persons in charge of the vessel. The court say: "That the proper management of the boilers and machinery of a steamboat requires skill, must be admitted. Indeed, by the act of Congress of August 30th, 1852, great and unusual precautions are taken to exclude from this employment all persons who do not possess it. That an omission to exercise this skill vigilantly and faithfully endangers, to a frightful extent, the lives and limbs of great numbers of human beings, the awful destruction of life in our country by explosions of steam boilers but too painfully proves. We do not hesitate therefore to declare that negligence in the care or management of such boilers, for which skill is necessary, the probable consequence of which negligence is injury and loss of the most disastrous kind, is to be deemed culpable negligence, rendering the owners and the boat liable for damages, even in case of gratuitous carriage of a passenger. Indeed, as to explosion of boilers and flues, or other dangerous escape of steam on board steamboats, Congress has, in clear terms, excluded

all such cases from the operation of a rule requiring gross negligence to be proved to lay the foundation of an action for damages to person or property."

It has been held frequently that the owners of steamboats are liable for the destruction of property by fire caused by sparks from their smoke-stacks, where due care has not been used.

It has been so repeatedly decided in England and in this country, that railroad companies are responsible for the destruction of property by fire caused by sparks or coals of fire from their engines, where all reasonable precautions have not been used to prevent such injury, that we would not be justified in attempting to cite authorities in support thereof. The citation of such cases would cover several pages.

The principles of law enumerated in the foregoing analogous cases apply with equal force and directness to the present case, and fix and determine the liability of the appellants. We are, therefore, of the opinion that the appellants are liable in damages to the extent of the injury sustained by the appellees, if it was proved upon the trial, either that ordinary care and diligence were not employed in the construction of their chimney, furnaces, and flues, or that they were guilty of negligence in the management thereof.

Appellants' counsel contend that there is no evidence of the use of any dangerous or improper fuel. Counsel for appellees admit that there was no witness who testified to the particular kind of fuel used in the furnace on the morning in question, but they maintain that there was evidence from which the jury had the right to conclude that dangerous and improper fuel had been used; they contend that it was abundantly proved that smoke, sparks, and flame were seen coming from the chimney top; that such evidence, when considered in the light of the testimony of the experts, conclusively demonstrated either that improper fuel had been used, or that the chimney and flues had been unskillfully built, for the reason that all the scientific witnesses testified and agreed that a well-constructed chimney, in which safe

fuel only was used, would not send out sparks and fire from the top.

While positive affirmative testimony as to the kind of fuel used would have been more satisfactory and convincing, the jury may have found, from the effects produced, that dangerous and inflammable fuel was used.

Upon the ground, namely, the negligent and improper construction of the furnace and chimney, appellants' counsel concede that there was evidence upon which the verdict might rest, but they claim that the weight of the evidence is the other way. They attempt to take this case out of the rule of this court against determining questions of the weight of evidence, by the suggestion that the question is "dependent for its solution upon philosophical principles and mechanical skill and judgment." This may be true to an extent, but these principles and that skill and judgment are the subject of evidence, and this court is as much bound to respect the conclusions of a jury in this class of cases as in any other.

The question of negligence is one of mingled law and fact, to be decided as a question of law by the court when the facts are undisputed or conclusively proved, but not to be withdrawn from the jury when the facts are disputed and the evidence is conflicting.

Field v. New York Central Railroad, 32 N. Y. 339; *Fremanile v. London, etc., R. W. Co.*, *supra*; *Greenleaf v. The Illinois, etc., R. R. Co.*, 29 Iowa, 14; *Jenkins v. Little Miami R. R. Co.*, 2 Disney, 49; *Eagan v. Fitchburg R. R. Co.*, 101 Mass. 315; *Maloy v. The New York Central R. R. Co.*, 58 Barb. 182; *Belton v. Baxter*, 2 Sweeny (N. Y.) 339; *The Pennsylvania Canal Co. v. Bentley*, 66 Pa. St. 30.

The opinion of the court, in the case of *Field v. New York Central Railroad*, *supra*, is so much in point, that we have concluded to make an extended quotation therefrom. The court say: "But the defendants now insist that although they may have caused the injury, the nonsuit should have been granted for the reason that no cause of negligence on

their part was made out. If I understand their position correctly, it is, that in this class of cases it is incumbent upon the party injured, if he would make a *prima facie* case, to show affirmatively that there was something improper in the construction of the defendants' engines, or that they were not in order, or were insufficiently or improperly managed. This is not the rule. Undoubtedly, the burden of proving that the injury complained of was caused by the defendants' negligence was upon the plaintiff. To show negligence, however, it was not necessary that he should have proved affirmatively that there was something unsuitable or improper in the construction or condition or management of the engine that scattered the fire communicated to his premises. It often occurs, as in this case, that the same evidence which proves the injury shows such attending circumstances as to raise a presumption of the offending party's negligence, so as to cast on him the burden of disproving it. Then the injury was caused by dropping from the defendants' engines coals of fire. The fact that the sparks or coals were scattered at all upon their roadway, in such quantities as to endanger property on abutting premises, raised an inference of some weight that the engines were improperly constructed or managed. But this was not all. It was conceded and proved that if the engine is properly constructed, and in order, no fire of any amount will escape to be distributed along the track. It was shown that four or five of the defendants' engines that passed the plaintiff's farm, were defective in apparatus to avoid scattering of fire, and although the others were fitted with the necessary improvements to retain it, and in this respect there was no want of care on the part of the company, yet that constant oversight was required, and if they scattered fire, it was because they were out of order. It was legitimately to be inferred from these facts, that the scattering of coals of fire from the defendants' engines which were found upon their track, and which produced the injury, was the result either of defectiveness in the machinery, or neglect in repairing it.

Gagg et al. v. Vetter et al.

There was enough, therefore, in the evidence to justify a submission of the question to the jury, whether the injury complained of was caused by the negligent conduct of the defendants."

In the summing up of the judge to the jury in the case of *Fremantle v. London, etc., Railway Co.*, 10 C. B. 89, he said: "The question is, whether, notwithstanding the evidence of impossibility which has been adduced by all that numerous company of witnesses, do you nevertheless think that the plaintiffs have established the fact that the fire could not be accounted for upon any other supposition than that it must have come from the engine. If you do, then I must repeat that all this evidence that is so powerful on the first question is cogent against the defendants upon the second, because it then goes to show that the fire was occasioned by an engine which was so perfect in its quality that nothing could have caused the emission of sparks except negligence, either in the condition of the engine or in the way in which it was worked by the driver; and therefore the evidence then becomes cogent the other way."

May it not be said in the case at bar, with equal force, that when the jury once adopted the conclusion, from the evidence, that sparks from defendants' chimney did fire plaintiffs' house, the evidence that this was a well-constructed chimney became cogent against defendants, upon the question of a negligent use. The first fact being proved, the more perfectly the structure of the work is justified, the more clearly its misuse is shown.

There was much evidence on both sides on the question of the skilful and careful construction of the chimney, the furnace, and flues. The evidence was conflicting, and therefore the question of fact was properly submitted to the jury. The jury was correctly instructed as to the law applicable to the case. In such a case, we cannot disturb the verdict. To do so, would be to usurp the functions of the jury.

It is also claimed that the court erred in the admission of

testimony to prove that smoke, sparks, and flame had been seen coming out of the top of the chimney at other times than on the occasion of the injury complained of, and, in instructing the jury, that it was proper for them to consider and weigh such evidence, in determining whether the chimney and smoke-stack had been properly constructed.

That such evidence was properly admitted, and that the instruction complained of contained a correct exposition of the law, is too well settled to admit of a doubt. The question should no longer be regarded as an open one. *Piggot v. The Eastern Counties Railway Co.*, 10 Jur. 571; *Aldridge v. The Great Western Railway Co.*, 3 Man. & G. 515; *Sheldon v. The Hudson River R. R. Co.*, 14 N. Y. 218; *Field v. New York Central Railroad*, 32 N. Y. 339; *Ross v. Boston, etc., R. R. Co.*, 6 Allen, 87.

In *Field v. New York Central Railroad*, *supra*, the court say: "The remaining exception was to the reception of testimony, that coals of fire had been frequently found on defendants' track, or been seen to have dropped from their engines in passing the plaintiff's farm, on other occasions than that of the fire complained of. The competency of this species of proof was settled in the case of *Sheldon v. The Hudson River R. R. Co.*, 4 Kernan, 218. It was said in that case, in the leading opinion, the evidence 'had a bearing upon both branches of the case which the plaintiff undertook to establish. It not only rendered it probable that the fire was communicated from the furnace of one of the defendants' engines, but it raised an inference of some weight, that there was something unsuitable and improper in the construction of the engine which caused the fire.'"

Finally, it is earnestly insisted by counsel for appellants that the verdict is not supported by the evidence. But counsel for appellees contend that all the evidence is not in the record. We will state the point in the language of the counsel. They say: "There is a sufficient reason, however, aside from the rule referred to, why this court cannot

consider the question of the weight of the evidence, on this or the other branches of the case. The evidence is not all here. The jury, after the conclusion of the oral evidence, was, at the request of the appellants, conducted by a bailiff to inspect the premises concerning which evidence had been given, and particularly the furnaces, chimney, etc., of appellants' brewery. What they saw, or what impressions were made upon their minds by what they saw, this court cannot know.

"This inspection may have modified the views of the jurors as to the decisive facts in the case. The furnaces may have been in operation, and their defects may have been demonstrated in the very view of the jurors. Of all this, the court here can know nothing. In the case of *The Evansville, etc., R. R. Co. v. Cochran*, 10 Ind. 560, the court refused to consider a question as to the sufficiency of the evidence to support the verdict, on the ground that all the evidence was not in the record; the jury having been sent to inspect the premises, and there being nothing in the record to show the effect of the examination upon their minds. There seems to be good reason in this, and if the ruling is adhered to, there is an end of the appellants' objections."

The objection is not well taken. The case of *The Evansville, etc., Railroad Co. v. Cochran, supra*, was in express terms overruled by this court in the case of *The Jeffersonville, etc., Railroad Co. v. Bowen*, 40 Ind. 545.

We, therefore, hold that the evidence is all in the record. There are eleven hundred and forty-five pages in the record. The appellants have furnished us with a printed abstract of the evidence, which covers sixty-eight pages. We have read and considered with great care such abstract, and the substance of the entire evidence, and we have read in full the testimony of all the witnesses to whom our attention has been specially called by counsel for appellant. We have had the case under advisement and consideration for a long time. We have given the questions involved a patient and

Gagg et al. v. Vetter.

careful consideration, and entertain no doubt that we are required by the law and the well-settled practice of this court to affirm the judgment.

The evidence is plainly, palpably, and directly conflicting. The verdict of the jury depended upon the weight which should be given to the testimony of the two sets of witnesses. The testimony could not be reconciled and harmonized so that it might all stand. The jury were compelled to believe the one set and disbelieve the other, except the scientific witnesses, who, doubtless, honestly differed in their views.

Upon such a state of facts we cannot disturb the verdict. *The Madison and Indianapolis Railroad Co. v. Taffe*, 37 Ind. 361.

The judgment is affirmed, with costs.*

T. A. Hendricks, O. B. Hord, A. W. Hendricks, J. Hanna, and F. Knefler, for appellants.

A. G. Porter, B. Harrison, W. P. Fishback, and C. C. Hines, for appellees.

*Petition for a rehearing overruled.

GAGG ET AL. v. VETTER.

APPEAL from the Marion Civil Circuit Court.

PETTIT, C. J.—This case, in all legal respects, is the same as *Gagg v. Vetter*, *ante*, p. 228; and it is understood by the parties that this is to abide by the decision in that.

The judgment is affirmed, on the authority of that, at the costs of the appellants.

T. A. Hendricks, O. B. Hord, A. W. Hendricks, J. Hanna, and F. Knefler, for appellants.

A. G. Porter, B. Harrison, W. P. Fishback, and C. C. Hines, for appellee.

Skillen v. Skillen.

SKILLEN v. SKILLEN.

EVIDENCE.—*Transactions with Ancestor of Plaintiff.*—*Statute.*—In a suit upon a promissory note, the defendant offered to testify to transactions between himself and the ancestor of the plaintiff, for the purpose of showing that the note in suit was given to the plaintiff, as one of the heirs of said ancestor, for the plaintiff's interest in said ancestor's real estate, which the defendant had purchased, and for which he executed the note in suit; and that he ought not to have given the note, because the ancestor was indebted to the defendant, by reason of transactions occurring between the defendant and said ancestor during the lifetime of the latter.

Held, that the evidence was not competent under the second proviso of the act of March 11th, 1867, 3 Ind. Stat. 561. BUSKIRK, J., dissented, holding that the decision in *Peacock v. Albin*, 39 Ind. 25, authorized the introduction of the evidence.

APPEAL from the Marion Superior Court.

PETTIT, C. J.—William M. Skillen, the appellee, brought this suit, as assignee of James Skillen, Jr., against James Skillen, the appellant, on a promissory note, dated September 21st, 1869, and payable eleven months after date, to James Skillen, Jr., and by the payee assigned to the appellee, William M. Skillen.

The defendant below, appellant here, answered as follows:

"This defendant says that he executed the note sued on, under a mistaken state of facts, viz., this defendant and one Robert G. Skillen, the father of this plaintiff, were partners in the milling business at Indianapolis, Indiana; that they commenced said partnership in December, 1861, and that the firm rented the mill of this defendant, at the rate of eleven hundred dollars per annum, from the date aforesaid up to the — of —, 1863, and that said Robert G. had sole and exclusive control over the books of said firm, and this defendant was to have charge of the out-door business; that it was agreed that this defendant should have credit for the amount of said rent, each and every three months, on the books of the firm (partnership); and that afterward, on the — of —, 1864, this defendant being the owner in fee of all the mill property thus used by the firm, he sold and conveyed unto his said partner, Robert G., the undivided one-

half of said mill, in consideration of five thousand five hundred dollars, which amount he agreed to put in said business, and advance to said firm; that said Robert G. agreed to give him, this defendant, credit on the firm books for that amount; and that he did not do so, nor did he ever pay, or account to this defendant, in any way, for the purchase-money of the undivided one-half of said mill, as he promised to; and that afterward, viz., in October, 1865, this defendant advanced said firm, in cash, the sum of five hundred dollars, which should have been credited to this defendant on the books of said firm, but said Robert G. did not give him said credit, nor account to this defendant in any way for said sum; the defendant now charges that he is entitled to the above respective sums, with interest; and at the time this note was executed, he honestly believed that the proper credits had been given this defendant for said sums, but long afterward, and on examination of the firm books, when called upon to settle up the accounts of the said firm as surviving partner, to his utter surprise and astonishment, he discovered for the first time that the said Robert G., his former partner, did neglect and refuse, and with intent to cheat and defraud this defendant, to give him said credits; that none of them were found on the books, and this defendant was defrauded out of said amount as aforesaid, with interest, and that said amount with interest is due this defendant from the ancestor of this plaintiff; and this defendant now avers that after the death of said Robert G., a petition for the partition of said mill property was filed in the Common Pleas Court of Marion county, and the whole of said mill property, so owned by said Robert and this defendant, was sold by order of court, and purchased by this defendant for twenty thousand dollars; that the amount this note called for would be the amount due this plaintiff as his share of the proceeds of said mill as an heir-at-law of Robert G., deceased; and the defendant being ignorant of the above facts, he accordingly executed this note, and for no other consideration whatever; and this defendant fur-

Skillen v. Skillen.

ther avers, that this plaintiff is wholly and notoriously insolvent, and that there is no partnership property out of which this defendant can make said amount, or any part thereof; and in case this note was paid him, he could not call upon him, plaintiff, to account to him, for nothing could be made of him on execution. Wherefore, this defendant says he is not liable, and is in no wise indebted to this plaintiff as such heir, nor to the estate of his ancestor, Robert G."

There was a proper reply; trial; finding and judgment for the plaintiff.

On the trial, the defendant, appellant, offered himself as a witness to prove the business and transactions with Robert G. Skillen, the ancestor of the plaintiff, as set up in his answer. To this objection was made, and sustained by the court. The correctness of this ruling is the only question in this case.

By the second proviso of sec. 2 of the act of March 11th, 1867, 3 Ind. Stat. 561, it is provided, that "in all suits by or against heirs, founded on a contract with or demand against the ancestor, the object of which is to obtain title to or possession of land or other property of such ancestor, or to reach or affect the same in any way, neither party shall be allowed to testify as a witness as to any matter which occurred prior to the death of such ancestor, unless required by the opposite party, or by the court trying the cause, and the assignor of the plaintiff in any such suit, where there has been an assignment of the cause of action, shall be deemed and held to be a party within this provision." See the notes to this proviso.

In *Malady v. McEnary*, 30 Ind. 273, this court has given a construction to this proviso, as it affects this case. This court, in that case, said: "The evident intent was, in suits by or against heirs, to exclude the testimony of the parties to the action as to any matter which occurred prior to the death of the ancestor, so as to prevent the living from testifying against the representative of the dead. Death having sealed the lips of one, the law seals the lips of the other."

The court below, in delivering its opinion, says: "Now, it is clear, that what the defendant offered to testify to was in relation to the transaction between him and Robert G. Skillen, the ancestor of the plaintiff, for the purpose of showing that the note in suit was given to the plaintiff as one of the heirs of Robert G. Skillen, for his portion or interest in said Robert G. Skillen's real estate, which defendant had purchased, and for which he executed this note in suit, and that he ought not to have given it, because Robert G. Skillen owed the defendant. It was as to matters prior to the death of said Robert G. Skillen, and would affect the property of the ancestor. We see no error in excluding the testimony of the defendant on this subject."

We feel quite clear that this ruling of the court was correct, and must, therefore, affirm the action of the court below.

The judgment is affirmed, at the costs of the appellant.

BUSKIRK, J.—I am constrained to dissent from the decision rendered by a majority of the court. In my opinion, the appellant was, under the rule laid down in the case of *Peacock v. Albin*, 39 Ind. 25, a competent witness, and that for the erroneous ruling of the court in excluding him, the judgment should be reversed.

S. E. Perkins and *S. E. Perkins, Jr.*, for appellant.

F. M. Finch and *J. A. Finch*, for appellee.

THE MONTMORENCY GRAVEL ROAD COMPANY v. ROCK.

PRACTICE.—*Finding of Facts and Conclusions of Law.—Motion for New Trial. Exception to Conclusions of Law.—Assignment of Error.—Where a cause*

41	263
186	611
186	351
41	263
137	266

The Montmorency Gravel Road Company v. Rock.

is submitted to the court for trial, and the court is requested by one of the parties to find the facts, and then the conclusions of law upon them, two things are to be done. 1. The court must state the facts, which of necessity involves the finding of the facts. 2. The court must state the conclusions of law upon the facts.

If in finding the facts the court has erred, a motion for a new trial is the proper remedy, and the assignment on appeal of the overruling of such motion presents all questions properly set forth in the motion. If the court has erred in the conclusions of law, the error is reached by excepting to the conclusions of law and assigning the error on the record on appeal. A motion for a new trial on the ground of error in the conclusions of law, and the assignment of the overruling of the motion as error will present no question to the Supreme Court.

TURNPIKE.—Appropriation of Land.—Damages.—In a proceeding to appropriate land for a gravel road, the cost of material for a fence on each side of the road, where it runs through the land of which a portion is condemned, is a proper element of damages.

APPEAL from the Carroll Circuit Court.

DOWNEY, J.—This was a proceeding commenced by the appellant against the appellee to appropriate a portion of his land on which to construct its road, the appellee having refused to relinquish the same, and the parties not having been able to make a contract for the same, according to section 7, 1 G. & H. 475. The proceeding was commenced before a justice of the peace in Tippecanoe county. The three jurors summoned before the justice determined that the appellee sustained no damage by reason of the appropriation of the land. The appellee appealed to the Tippecanoe Civil Circuit Court. The venue was then changed to the White Circuit Court, and then to the Carroll Circuit Court, where there was a trial by the court, and a special finding, and, notwithstanding a motion for a new trial, a judgment for the appellee for five hundred dollars damages.

The only error assigned in this court is the overruling of the appellant's motion for a new trial. The reasons for a new trial are the following: first, the court erred in the conclusions of law in allowing the defendant consequential damages, and refusing to charge him with consequential benefits to his lands; second, because the court erred in allowing ex-

cessive damages to the defendant; third, the said findings of fact are contrary to law, and not sustained by sufficient evidence.

No question is presented by the record as to the correctness of the conclusions of law by the court. If such conclusions of law were incorrect, they should have been excepted to by the appellant, and assigned as error. A new trial is a re-examination of the facts. *The City of Logansport v. Wright*, 25 Ind. 512.

The amount of the damages awarded does not appear from the evidence to have been excessive. On the contrary, some of the witnesses estimate the amount higher than the finding of the court.

We discover no reason for granting a new trial because the finding is contrary to law, and we think it in accordance with the evidence. The question mainly discussed is that the court improperly included in the estimate of the damages the expense or cost of materials for a fence on each side of the road where it runs through the lands of the appellee, and we are referred to the *Indiana Central Railroad Company v. Hunter*, 8 Ind. 74. But in that case the evidence was excluded because the allegations of the complaint were too narrow to allow the evidence to be given. There is no such objection in this case. It seems to us to be a proper element of damages in such a case. *The White Water Valley R. R. Co. v. McClure*, 29 Ind. 536.

The judgment is affirmed, with ten per cent. damages and costs.

ON PETITION FOR A REHEARING.

DOWNEY, J.—There is a petition for a rehearing filed in this case, in which counsel show so much confidence in their belief that the court has fallen into an error that we have thought proper to depart from the general rule and present some further views in overruling the petition. To be entirely fair with counsel, we give their positions in the very language of the petition:

The Montmorency Gravel Road Company v. Rock.

"The court declines to consider the correctness of the conclusions of law reported by the court below, because the same had not been excepted to and had not been assigned for error. As we pique ourselves somewhat upon our carefulness in such matters, we hope the court will do us the justice to reconsider this branch of their decision. By reference to the record it will appear that when the conclusions of law were rendered, we excepted separately to each of them. On the same day, *ex abundanti cautela*, we filed a bill of exceptions, setting forth the conclusions of law, and that exception was taken to the same. In our motion for a new trial, we assigned, as the first reason, that the court erred in the conclusions of law. In our brief, filed in this appeal, we expressly call the attention of the court to these passages in the record. We fail to perceive how we could have improved our caution and vigilance.

"We are considerably surprised to learn that we failed to assign these conclusions of law as error. We were under the impression that when we assigned the wrongful overruling of our motion for a new trial, we thereby covered our objections to the conclusions of law. 'A motion for a new trial,' says this court in their decision, 'is a re-examination of the facts.' So it is, and it is also much more. All error, whether of fact or law, which occurs during the trial, is subject to review on a motion for a new trial. This is so at common law, and our statute expressly specifies 'error of law occurring at the trial and excepted to by the party making the application.' The very decision quoted by this court, *The City of Logansport v. Wright*, 25 Ind. 512, sustains us in this case. Now if our motion brought under review the erroneous conclusions of law, and the court below, after considering the motion, adhered to its conclusions, does it not bring in issue the correctness of the conclusions when we assign in this court that there was error in overruling our motion? If we have mistaken the scope of our assignment of error in this case, then have we been misled by the present honorable bench which held, in *Boulden v. Scircle*,

34 Ind. 60, (if we may trust the syllabus) that 'where the overruling of a motion for a new trial is assigned as error, this presents to the Supreme Court all the grounds for a new trial properly set forth in the motion, and said grounds for a new trial need not be specially assigned as errors.'"

When the trial is by the court, without a jury, under sections 340 and 341 of the civil code, 2 G. & H. 207, it is not necessary for the court to state its findings, except generally for the plaintiff or the defendant, unless one of the parties request it, with the view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall first state the facts in writing, and then the conclusions of law upon them, and judgment shall be entered accordingly. There are, in case the court is requested by one of the parties to find the facts and then the conclusions of law upon them, two things to be done. First, the court must state the facts, which, of necessity, involves the finding of the facts, for they cannot be stated until they have been found; and, second, the court must state the conclusions of law upon the facts. If the court, in discharging the first of these duties, that is, in finding and stating the facts, has erred, a motion for a new trial is the proper remedy of the party against whom the error has been committed. The action of the court in finding and stating the facts is somewhat like the action of a jury in finding and returning a special verdict in which they find the facts and refer the questions of law to the court for its decision. The facts are to be found and stated, before the court proceeds to state its conclusions. The conclusions of law are in the nature of inferences or conclusions from the facts, which form the basis for such conclusions or inferences. The second step in the discharge of its duties, in thus disposing of a case, is not taken until the first has been fully taken and is terminated. If the court has mistaken the law to be applied to the facts, as found, or has come to a wrong conclusion, this is not an error of law committed during the trial in such sense as to make it a reason for a new trial, or re-

The Montmorency Gravel Road Company v. Rock.

examination of the facts of the case. The facts had already been found and stated, and they are the same after the erroneous conclusions of law have been stated, that they were before. Warring with the conclusions of law is one thing, while objecting to the finding and statement of the facts, which have preceded the conclusions, is an entirely different thing. One relates to the facts, and the other to the conclusions of law upon the facts. We stated in the original opinion in the case under consideration, that if the conclusions of law were incorrect, they should have been excepted to by the appellant and assigned as error. To this, counsel say that they excepted to the conclusions of law, moved for a new trial, and assigned as error the overruling of that motion. This is not the equivalent of the other. In *Luirance v. Luirance*, 32 Ind. 198, in speaking of this question, the court said: "The proper mode of saving the question in such cases is by a simple exception to the conclusions of law stated by the court, and not by a motion for a new trial." If the motion for a new trial was not a proper mode of saving the question, it follows, it seems to us, that to assign as error the overruling of the motion for a new trial in this court cannot possibly present the question here. Counsel suppose that, because error of law occurring at the trial is a reason for a new trial, that means error of law occurring in the conclusions of law after the facts have been found and stated. We do not think so. If the court should become satisfied that it had erred in its conclusions of law upon the facts found and stated, would it correct that error by a re-examination of the facts, as upon a new trial? Certainly not. It would simply correct its conclusions of law upon the facts. It is conceded that a new trial is a re-examination of the facts and incidentally, also, of the questions of law decided by the court during the trial. But it cannot be conceded that an error of the court in its conclusions of law is an error committed during the trial. We see nothing in our ruling in this case inconsistent with what was said in *Boulden v. Scircle*, referred to by counsel. If it is true, as stated in *Luirance*

Maxfield v. The Cincinnati, Indianapolis, and Lafayette Railroad Company.

v. *Luirance, supra*, that the proper mode of presenting the question is not by a motion for a new trial, if it is not cause for a new trial, then to assign as error the overruling of the motion for a new trial does not present the question. What we decided in that case, and what we and our predecessors have so often decided, was, that the assigning as error of the overruling the motion for a new trial presents to this court all the grounds for a new trial properly set forth in the motion. Counsel did except to the conclusions of law by the court, but as they did not assign such conclusions of law as error, the question is not before us. See *Cruzan v. Smith, post*, p. 288, and cases cited.

The petition is overruled.

J. A. Stein, S. A. Huff, B. W. Langdon, and J. S. Pettit,
for appellant.

L. B. Sims, for appellee.

MAXFIELD v. THE CINCINNATI, INDIANAPOLIS, AND LAFAYETTE
RAILROAD COMPANY.

PLEADING.—*Negligence.—Railroad.*—A complaint seeking a recovery from a railroad company on the ground of negligence in running a train of cars, whereby the plaintiff has been injured, must expressly allege that the injury occurred without the fault or negligence of the plaintiff, or it must clearly appear from the facts which are alleged that such must have been the case.

APPEAL from the Marion Circuit Court.

BUSKIRK, J.—The record in this cause presents for our consideration and decision but a single question, and that involves the correctness of the ruling of the court in sustaining a demurrer to the complaint. The complaint was as follows:

“William Maxfield, the plaintiff in this suit, complains of

Maxfield v. The Cincinnati, Indianapolis, and Lafayette Railroad Company.

The Cincinnati, Indianapolis, and Lafayette Railroad Company, a corporation organized under and by virtue of a general law of the State of Indiana, approved February 23d, 1853, defendant, and says that on the 15th day of August, 1869, he purchased, at the ticket office in the Union Depot of the city of Indianapolis, county and state aforesaid, a railroad ticket, a copy of which is filed herewith and made a part hereof, for which he paid the sum of sixty cents, for the purpose of riding on the railroad of said defendant from the city of Indianapolis to the town or village of Acton, in said county of Marion, and return, that being the price charged by the said defendant for that purpose; and the defendant thereby, then, and there, in consideration of the premises, agreed with the plaintiff to carry him on said road, as aforesaid, safely and without injury or damage; and the plaintiff avers, that on getting on the train of coaches at the said village of Acton, on the day and year last aforesaid, for the purpose of returning to the city of Indianapolis aforesaid, he found the coaches composing said train so crowded with passengers that there was no room whatever for him to occupy, either in the inside of any or either of said coaches, or on the platform thereof; that the plaintiff, together with quite a number of other passengers, with the knowledge, permission, and direction of the conductor of said train, got on the top or roof of one of said coaches; that he, the said plaintiff, had no knowledge, of any kind whatever, of any obstructions over said railroad, in the form of bridges or otherwise, under which said train would pass; the plaintiff further avers, that on coming into the said city of Indianapolis, said train running at the rate of ten miles an hour, in the dusk of the evening of said day, said train passed under a bridge on Noble street, in said city, which was constructed over and across the said railroad of said defendant, which was so low that the plaintiff could not pass under the said bridge in a sitting position on the top of said coach, and of the existence of which said bridge the defendant at the time, then and there, had full knowledge; and the plaintiff further

Maxfield v. The Cincinnati, Indianapolis, and Lafayette Railroad Company.

avers, that by the negligence of said defendant, through the agents of said defendant then in charge of said train, by said defendant's not giving any notice or warning whatever of the approach of said train to the said bridge, and by running said train at such speed under and by said bridge, the plaintiff, in passing under said bridge on said train, was struck, he at the time being in a sitting position, on the head by said bridge and knocked off of said coach to the ground, in consequence of which the plaintiff's skull was badly fractured, and his spinal column was badly and permanently injured, causing weakness of sight and double vision, and rendering his neck permanently stiff; and the plaintiff further avers that he was put to great expense in having his wounds treated, by having to pay a large doctor's bill, to wit, the sum of five hundred dollars, also to great expense on account of board and nursing, to wit, the sum of five hundred dollars, and that he sustained great loss of time, to wit, six months, which was of the value of four hundred dollars; and he further avers, that in consequence of the above premises and injuries, he has sustained damage to the amount of ten thousand dollars, for which he demands judgment, and other proper relief."

The complaint is fatally defective for not averring that the plaintiff did not, by his own fault or negligence, contribute to the injury by him received. The averment must be either expressly made in the complaint, that the injury occurred without the fault or negligence of the plaintiff, or it must clearly appear from the facts which are alleged, that such must have been the case. There is no direct averment in the complaint as to the fault or negligence of the plaintiff, and the facts stated fall far short of showing that the injury must have occurred without the fault or negligence of the plaintiff.

The Evansville, etc., R. R. Co. v. Hiatt, 17 Ind. 102; *The Indianapolis, etc., R. R. Co. v. Keeley's Adm'r*, 23 Ind. 133; *The Evansville, etc., R. R. Co. v. Dexter*, 24 Ind. 411; *The Jeffersonville, etc., R. R. Co. v. Hendricks' Adm'r*, 26 Ind. 228.

The Pigeon Creek Draining Association *v.* Lagrange.

There are other defects in the complaint, which we do not deem it necessary to notice, as the judgment must be affirmed for the reason already stated.

The judgment is affirmed, with costs.

W. Morrow and *N. Trusler*, for appellant.

C. Baker, O. B. Hord, and A. W. Hendricks, for appellee.

THE PIGEON CREEK DRAINING ASSOCIATION *v.* LAGRANGE.

DRAINING ASSOCIATION. — *Appraisers.* — *Schedule.* — Lands not liable to be affected at all, either beneficially or injuriously, along the line of a proposed drain, are not required to be returned by the appraisers appointed to make a schedule; and if no lands are injured, the appraisers may so declare in their return, and if in such case the schedule returned contain all the lands benefitted it will be sufficient.

SAME. — *Notice, Informal or Irregular.* — *Recording.* — If the notice of the time and place, when and where the appraisers will begin the examination of the lands, be informal or irregular, still it does not invalidate the assessment, when the amount thereof is clearly set forth in the appraisers' schedule, which is properly recorded, due notice thereof being given.

APPEAL from the Gibson Common Pleas.

WORDEN, J. — This was an action by the appellant against the appellee, to collect an assessment by enforcing the lien thereof upon the land of the appellee. A demurrer to the complaint, for want of sufficient facts, was sustained, and the appellant excepted. Final judgment for the defendant.

The complaint, it seems to us, states all the facts necessary to a recovery. Indeed, it shows a much stricter compliance with the law than is usually met with in such cases. It shows that the plaintiff is a duly organized corporation, under the act of 1869, 3 Ind. Stat. 222, for the construction of the ditches and drains mentioned; that the company appointed an engineer, who made an estimate of the cost of

constructing the drains, which were located by the company, and are fully described; that appraisers were duly appointed to assess the benefits and injuries, who, upon due notice having been given, proceeded to the discharge of their duty, and returned their assessment, which was recorded in the proper recorder's office, and due notice thereof given. It appears that the benefits assessed exceed the estimated cost of construction, and that the sums sought to be collected are necessary for the work. It appears, also, that the corporation has given bond, as required by the statute, and that the directors have made the proper order for the collection of the assessments.

Two objections are made to the proceedings; first, that, the schedule of assessments returned is insufficient; and, second, that the notice of the time and place, when and where the appraisers would begin the examination of the lands, was insufficient.

The return of the appraisers commences as follows:

"To the Secretary of The Pigeon Creek Draining Company. The undersigned appraisers of the Pigeon Creek Draining Company, appointed by the Honorable John Baker, judge of the Gibson Circuit Court, having examined all the lands in Gibson county, the intrinsic or market value of which will, in their opinion, be affected by the construction of the proposed work of said company, or which is supposed by them to be liable to be affected thereby, and having assessed to each of said tracts the full and entire assessment of the benefit which it will, in their opinion, receive, do return the following schedule of said lands, with the amount of the said benefits placed opposite to each tract thereof, to wit." Here follows a description of over thirty tracts, of forty acres each, with the assessment upon each tract, including four belonging to the defendant. It should be observed, perhaps, that there is a separate paragraph in the complaint, based upon the assessment upon each tract. The assessment then concludes as follows: "And they further find, upon their said ex-

amination, that, in their opinion, no injury will be sustained by any tract of land. They therefore return to you the foregoing as a full and complete schedule of all of the lands by them supposed to be affected by the works proposed to be constructed, with the amount of benefits which each tract will receive."

The objection to the assessment, as we understand the brief of counsel, is, that there was not a separate assessment of benefits and injuries. They say, after quoting a part of section six of the act on the subject, that, "the intention was, manifestly, that the appraisers should assess each tract separately, both as to benefits and injuries, in order that no careless or hasty assessment might be made to work injustice."

Lands not liable to be affected at all, either beneficially or injuriously, are not required to be returned; and if no lands are injured, and if the schedule returned contains all the lands benefited, there can be nothing further to schedule or return. If no lands are injured, we think the appraisers may say so in their return, as they have done in this case, for there can be nothing further for them to say on the subject.

We are of opinion that the return of the appraisers is in substantial compliance with the statute, and valid.

We pass to the second objection. The notice in question is as follows:

"TO THE PUBLIC.

"Notice is hereby given to the owners of land liable to be affected by The Pigeon Creek Draining Company, and to all persons interested, that appraisers, duly appointed for the purpose of assessing the benefits and injuries caused by the work of said company, will meet at the residence of Baily Williams, on Tuesday, the 12th day of July, 1870, and begin the examination of the lands liable as aforesaid, and the assessment of benefits and injuries thereto resulting from said work, commencing with the lands in the north-east corner of the south-east quarter of section No. 11, township 3, range 11 west, and proceeding in a westerly direction as far west and south as the lands liable as aforesaid extend;

The Pigeon Creek Draining Association v. Woods.

thence returning and extending said examination and assessment as far north and east as will enable them fully to complete such examination and assessment in the manner contemplated by law." This notice was signed by the president and secretary of the company, and published, as required by the ninth section of the statute above cited. No objection is pointed out to this notice, except that it is "exceedingly indefinite."

The notice seems to us to be in substantial compliance with the ninth section of the statute; but if informal or irregular, the defect cannot invalidate the assessment, under the provisions of the fifteenth section of the act.

We are of opinion that the court below erred in sustaining the demurrer to the complaint.

The judgment below is reversed, with costs, and the cause remanded for further proceedings, in accordance with this opinion.

W. M. Laud and *D. F. Embree*, for appellant.

A. C. Donald and *C. A. Buskirk*, for appellee.

THE PIGEON CREEK DRAINING ASSOCIATION v. WOODS.

APPEAL from the Gibson Common Pleas.

WORDEN, J.—Complaint by appellant against appellee to enforce collection of an assessment. Demurrer sustained to complaint, and judgment for defendant. The questions presented by the record are the same as those involved in the case of *The Pigeon Creek Draining Association v. Lagrange*, ante, p. 272; and for the reasons therein given, the judgment must be reversed.

The judgment below is reversed, with costs, and the cause remanded, for further proceedings.

W. M. Laud and *D. F. Embree*, for appellant.

A. C. Donald and *C. A. Buskirk*, for appellee.

Rose v. Allison et al.

ROSE v. ALLISON ET AL.

PRACTICE.—*Change of Venue.—Judge of Criminal Court.*—Where a change of venue has been taken from the judge in a civil cause, and a judge of a criminal court is called, and a jury is waived, and the cause is submitted to the judge for trial by agreement, no question can afterward be raised as to his jurisdiction to try the cause.

APPEAL from the Vigo Common Pleas.

PETTIT, C. J.—This suit was brought by the appellees against the appellant on a promissory note. After issues formed, an affidavit was filed for a change of venue on account of the prejudice of the judge, who thereupon called the judge of the criminal court of that county to preside and try the case.

After the judge thus called had taken his seat on the bench and called the case for trial, the transcript clearly shows that the parties waived a jury, and consented to try the case before and by the judge thus called and on the bench.

The only question in the case is, had the judge, under this state of facts, jurisdiction to try and render judgment in the case? Without deciding whether the judge would have jurisdiction of the case if objection had been made to him, we hold that there was a complete waiver of all objections to his right to try the cause. The case of *Barnes v. The State*, 28 Ind. 82, is not in point, because in that case the record did not show that there was a consent to try before the called judge, while in this case the record clearly shows such consent.

We have examined the evidence in the case, and it clearly and undoubtedly required the judgment that was rendered, and we cannot think that this case was brought here for any meritorious purpose, or to correct any wrong committed against the appellant, but for delay only.

The judgment is affirmed, at the costs of the appellant, with five per cent. damages.

M. M. Foab and *T. W. Harper*, for appellant.

J. H. Blake, *W. C. Ball*, *J. P. Baird*, and *C. Craft*, for appellees.

Keller *et al.* v. Boatman.

SCRANAGE *v.* RUSSELL ET AL.

SUPREME COURT.—*New Trial.*—*Bill of Exceptions.*—Where the error assigned in the Supreme Court is the overruling of a motion for a new trial, and the paper copied into the record as a bill of exceptions was not filed within the time limited by the court, there is no question presented for decision on appeal.

APPEAL from the Elkhart Common Pleas.

OSBORN, J.—The appellant has assigned for error overruling his motion for new trial. The appellee insists that the bill of exceptions is not properly in the record.

The cause was tried, and the motion for a new trial made and overruled, at the May term, 1871. Time was given the appellant until the second day of the next term of the court to prepare and file his bill of exceptions. That term commenced on the first Monday, the 4th day, of September. The bill of exceptions was filed on the 12th of September.

The bill of exceptions not having been filed within the time fixed by the court, although copied by the clerk, is not properly in the record. There is no question before us.

The judgment of said court of common pleas is affirmed, with costs and five per cent. damages.

J. H. Baker and *J. A. S. Mitchell*, for appellant.

W. A. Woods, for appellees.

KELLER ET AL. *v.* BOATMAN.

PRACTICE.—*Appeal by Part of Defendants.*—Where only part of several co-defendants against whom a judgment or decree has been rendered appeal, without notice of the appeal to the others as required by statute, the appeal will be dismissed.

APPEAL from the Hamilton Circuit Court.

PETTIT, C. J.—This suit was brought by the appellee against fifteen defendants, all of whom remained in the case

Ex Parte Teague.

to its final conclusion, and against all of whom a money judgment or a decree was rendered.

Two of the defendants, Keller and Small, prayed for an appeal, and have assigned errors. After their assignment of error is the following endorsement on the transcript: "Joinder in appeal. The defendant below, Sarah H. Keller, appeals, and says the court below erred in rendering the decree of foreclosure against her without proof, she being the wife of appellant, Robert H. Keller. And she prays a reversal."

There was no such party in the case as Sarah H. Keller, nor did such party or person take exception or ask an appeal.

Only a part of co-defendants, against whom a judgment or decree was rendered, having appealed, and not having complied with sec. 551, 2 G. & H. 270, following numerous and uniform rulings of this court, the appeal must be dismissed.

The appeal is dismissed, at the costs of the appellants.

L. Barbour and *C. P. Jacobs*, for appellants.

J. T. Dye and *A. C. Harris*, for appellee.

EX PARTE TEAGUE.

BASTARDY.—*Imprisonment.*—*Constitutional Law.*—*Statute.*—The provision of the bastardy act which authorizes the court to require the defendant to replevy the judgment by good freehold surety, or in default thereof to commit such defendant to jail until such security be given, is not in conflict with the latter clause of the twenty-second section of article one of the constitution of Indiana.

APPEAL from the Delaware Circuit Court.

BUSKIRK, J.—This was a proceeding by *habeas corpus*. The petition was as follows:

"The petitioner respectfully represents that he is at this time (April, 1871) restrained of his liberty illegally, at this, Delaware county, in the county jail thereof, by Orlando H. Swain, the sheriff of said county; that heretofore, to wit, on the — judicial day of the present (April, 1871) term of this (Delaware Circuit) court, judgment was rendered against the said petitioner, for the sum of eight hundred and fifty dollars, in an action of bastardy, then and there, and on that day, determined against him, in the case of *The State, ex rel. Lamira J. Huffman*; that, as a part of the finding in said cause, it was adjudged that on his failure to pay or replevy the said judgment, he be imprisoned in the county jail of said county; and being a man of no property, and hopelessly bankrupt, and having no means wherewith to pay said judgment, and being unable to provide and furnish security for its payment, said court committed him to said county jail, where he is now, by said sheriff, detained illegally and against his will; and he says that said restraint and unlawful detention are illegal, in this, that the act of the legislature, under which said bastardy proceeding was instituted, and under and by virtue of which the said judgment was rendered and imprisonment adjudged, is a civil statute, and not a criminal or penal one, and being a civil proceeding, only imposes a civil obligation, and does not warrant or authorize imprisonment or restraint of the liberty of any one proceeded against, under and in virtue of its provisions, and that the imprisonment thereunder is imprisonment for debt, and in contravention of the latter clause of the 22d section of article one (1) of the constitution of Indiana. Wherefore the prisoner says," etc.

To the above petition, which was properly sworn to, the following demurrer was filed:

"The State of Indiana, on the relation of Lamira J. Huffman, who is the relatrix in bastardy stated in the petition of David B. Teague for a writ of *habeas corpus*, and who has been notified of the filing of said petition, comes and demurs to said petition, and for cause says it does not state facts

sufficient to constitute a cause of action, or to authorize the granting of the writ of *habeas corpus*."

The demurrer was sustained, and the petitioner excepted; and the petitioner refusing to plead further, the court refused to order the writ, but remanded the petitioner to the jail.

The appellant assigns two errors in the court below; first, the action of the court in sustaining the demurrer to the complaint; second, committing the defendant to jail, as for a contempt, in failing to pay or replevy the judgment, over his own sworn petition, averring his inability to do so.

Two questions are presented for our decision. The first is, whether section 15 of the bastardy act, which authorizes the court to require of a defendant who has been adjudged to be the father of a bastard child, to replevy the judgment by good freehold surety, or in default thereof to commit such defendant to jail until such security be given, is in conflict with the latter clause of the 22d section of article 1 of the constitution of Indiana, which clause reads as follows: "And there shall be no imprisonment for debt, except in case of fraud."

The above question is not new in this State, but has been the subject of much discussion, and about which the decisions of this court have not been uniform or in harmony. The object of this suit is to reopen the controversy. This court, in *Byers v. The State, ex rel. Hutchison*, 20 Ind. 47, held that so much of the bastardy act as provided for the imprisonment of the defendant was unconstitutional and void. The decision in the above case was, in express terms, overruled by this court, in *Lower v. Wallick*, 25 Ind. 68. The learned counsel for the appellant claim that the question should not be regarded as settled; and they argue, with much ability and learning, that we should overrule the case of *Lower v. Wallick*, and reassert the principles enunciated in *Byers v. The State, ex rel. Hutchison, supra*. In our opinion, the question should no longer be regarded an open and unsettled one in this State. We have, in two cases, adhered to the

Swindell *et al.* v. Richey, Commissioner.

ruling in *Lower v. Wallick*. *The State, ex rel. Billman, v. Hamilton*, 33 Ind. 502; *Ex Parte Volts* 37 Ind. 237.

We are very clearly of the opinion that the ruling in *Lower v. Wallick* was correct, and it results that the court committed no error in sustaining the demurrer to the petition.

The imprisonment being legal, the court committed no error in remanding the prisoner to the custody of the jailer. The fact that the defendant was unable to replevy the judgment did not entitle him to a discharge. To hold such a reason valid, would virtually abrogate the statute.

The court below committed no error.

The judgment is affirmed, with costs against the appellant.

J. S. Buckles and *J. W. Ryan*, for appellant.

W. March and *J. A. Wells*, for appellee.

SWINDELL ET AL. v. RICHEY, COMMISSIONER.

VENDOR AND PURCHASER.—*Sale of Real Estate by Commissioner.*—*Action for Purchase-Money.*—*Making Deed.*—*Concurrent Acts.*—Where real estate was sold by a commissioner appointed by a court for that purpose, and the commissioner made to the purchaser a certificate of sale, reciting in it that a "deed was to be made when ordered by the court," but it contained no agreement or obligation on the part of the commissioner to make a deed;

Held, that the making of the deed, and the payment of the purchase-money, were not concurrent acts, and suit might be maintained for the last instalment of the purchase-money, without executing or delivering, or offering to execute and deliver, a deed.

SAME.—*Lien Upon Real Estate.*—*Set-Off.*—Where the owner of real estate, sold by a commissioner, agrees, at the time of the sale, that he will pay the amount of a ditch assessment against the real estate, and save the land harmless from such assessment, the amount of such assessment which the purchaser may have been compelled to pay may be set off against the unpaid purchase-money, in a suit for the same by the commissioner.

Swindell *et al.* v. Richey, Commissioner.

APPEAL from the Henry Common Pleas.

OSBORN, J.—The appellee, as commissioner in a case named, sued the appellants, to recover the amount of a promissory note payable by them to him as such commissioner.

The defendants answered in three paragraphs. The first paragraph alleged that the note was given for a part of the purchase-money and as the last payment for land, described in the answer, sold by the appellee, as a commissioner appointed for that purpose by the Henry Circuit Court, in the case named in the note, at public sale; that the land was purchased by Swindell for seven thousand six hundred and fifty-one dollars and thirty cents, one-third of which was paid down, and two notes executed for the residue by him, with Hudelson as his surety, in two equal payments, the first of which had been paid; that the note in suit was the other; that at the time of the sale, the appellee executed and delivered to Swindell a certificate of purchase, and thereby agreed to execute to the purchaser a proper deed of conveyance, on the order of the Henry Circuit Court; that afterward, the Henry Circuit Court confirmed the sale, and ordered that the commissioner execute, seal, and deliver to the purchaser a good and sufficient deed of conveyance for the land upon the payment of the purchase-money; that the commissioner did not, at any time before the commencement of the action, or since, execute, and deliver, or offer to execute and deliver, to Swindell a deed of conveyance for the land, on condition that he would pay the note in suit or otherwise.

A copy of the certificate is filed and made a part of the answer. It is an ordinary certificate of purchase, containing no binding words upon the commissioner. It simply recites the fact and terms of the sale; that it was made subject to the confirmation and approval of the court, and concluded as follows: "A deed to be made when ordered by the court."

The second paragraph alleges the sale of the land and the execution of the note, etc., as in the first; and in addi-

tion avers that before the order for the sale of land was made, a ditching company was duly organized, naming it, for the purpose of draining certain lands named, including the lands sold to Swindell; that the ditch had been located, in part, upon the land so sold to him, whereby it became liable to be assessed and taxed on account of the benefits to it by the construction of the ditch; that it was expressly agreed and publicly announced by the appellee and the proprietors of the land, at the time of and immediately before such sale, that such proprietors would pay said ditch tax and assessment, and that the purchaser thereof should take and have the land free from such tax and ditch assessment; that under such agreement and public announcement, and relying thereon, Swindell became the purchaser; that the land was assessed in benefits and taxed for the construction of said ditch in the sum of four hundred dollars; that the appellee and the proprietors of the land wholly failing and refusing to pay the assessment and tax, and the same being a lien on the land, Swindell was compelled to and did, before the commencement of the action, pay two hundred dollars of such assessment and tax, which sum he offered to set off against so much of the sum demanded in the complaint.

The third paragraph was like the second, except that instead of offering to set off the two hundred dollars paid on the assessment, it alleged a failure of consideration of the note as to that sum.

Separate demurrers were filed and sustained to each of the paragraphs of the answer, and exception duly taken. The appellants failing and refusing to answer further, the court, after hearing the evidence, rendered final judgment against them for the full amount of the note and interest.

The appellants assign for error, first, sustaining the demurrer to the first paragraph of the answer; second sustaining the demurrer to the second paragraph of the answer; third, sustaining the demurrer to the third paragraph of the answer.

The appellants contend that the certificate of purchase and the order of the court made the contract between the

Swindell *et al.* v. Richey, Commissioner.

parties and entitled the purchaser to a deed upon the payment of the purchase-money; that the tender of the deed and payment of the last instalment of the purchase-money were concurrent acts, and that the appellee could not maintain the suit on the note without having first tendered the deed. *Taylor v. Perry*, 5 Blackf. 599; *Henton v. Beeler*, 7 Blackf. 150, are cited to sustain that position.

It will be observed that in both of these cases, by the terms of the contract, it was agreed that the payment of the purchase-money and the execution of the deed should be concurrent acts. In the case of *Henton v. Beeler*, 7 Blackf. *supra*, the commissioner making the sale, at the time the notes were given, executed his obligation, binding himself to convey all the right and title of Matlock in the land sold, on payment of the purchase-money. The court held that no recovery could be had for the purchase-money until a deed was tendered for the land sold. The decision is placed entirely upon the terms of the contract. The court said: "The plaintiff contends that the statute under which these sales are made, requires the purchase-money to be paid before the making of the deed. It is sufficient, however, for the defendants in this case to show that the contract was otherwise." In the other case cited the plea alleged that the sale was made under an order of the probate court, the parties to the sale agreeing at the time that the payment of the purchase-money and the execution of the deed should be concurrent acts.

In the case at bar, the certificate shows that no agreement was entered into by the appellee, nor obligation assumed to make a deed to the purchaser, unless the words, "a deed to be made when ordered by the court," constitute such agreement or obligation. The certificate stated that the appellee, as commissioner, had sold the land to Swindell, at public sale, under an order of the court. It stated the price and terms of sale; that it was subject to the confirmation of the court. It also showed that notes had been given to secure the deferred payments. The certificate and note both

bear date April 10th, 1869. The answer alleges that the sale was confirmed at the fall term of the court, 1869, when the order for the deed was made. The contract of sale was completed on the 10th of April, and, by the contract, the payment of the purchase-money and the execution of the deed were not concurrent acts.

The statute in force at the time the sale was made provided, that "whenever it shall appear to the court that the purchase-money for the land sold has been duly paid, the court shall order such commissioner, or some other person, to execute conveyances to the purchaser." The contract did not, as in 7 Blackf. *supra*, bind the commissioner to make a deed. But like the case of *Swain v. Morberly*, 17 Ind. 99, it evidently meant that the purchaser would be entitled to a deed after the confirmation of sale, the payment of the purchase-money, and an order of the court that a deed should be made by such person as the court should designate. The certificate, in the case last cited, provided, that the purchaser should be entitled to a deed, "when this sale is confirmed by the court of common pleas of said county of Shelby." The answer in that case alleged that the sale had been confirmed by the proper court, and that no deed had been tendered to him, and that no application had been made to the court for a deed. The court said: "The certificate evidently means, that the purchaser will be entitled to a conveyance, if the sale should be confirmed; but it does not purport to fix any obligation upon the plaintiff, in this respect. Herein, the case differs radically from that of *Henton v. Beeler*, 7 Blackf. 150, which is relied upon by the appellants. In that case, the commissioner had entered into a bond, obligating himself to convey." The same difference exists in this case.

The court committed no error in overruling the demurrer to the first paragraph of the answer.

The facts alleged in the second and third paragraphs of the answer are the same. The only difference between them is, that the second claims the benefit by way of set-off, and

Swindell et al. v. Richey, Commissioner.

the third as a failure of consideration. We have concluded that, if the facts entitle Swindell to any relief, it will be as a set-off, and not a failure of consideration.

The statute, 2 G. & H. 88, sec. 57, provides, that "the set-off shall be allowed only in actions for money demands upon contract, and must consist of matter arising out of a debt, duty, or contract, liquidated or not, held by the defendant at the time the suit was commenced, and matured, at or before the time it is offered as a set-off." Section 58, p. 89 of the same statute, provides, that, "in all actions upon a note or other contract against several defendants, any one of whom is principal and the others sureties therein, any claim upon contract in favor of the principal defendant, and against the plaintiff, or any other former holder of the note or other contract, may be pleaded as a set-off by the principal or any other defendant." Section 3, p. 34, same statute, provides, that "every action must be prosecuted in the name of the real party in interest, except as otherwise provided in the next section." The next section, p. 37, provides, that "a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted." In the same section it is also provided, that "a trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another."

The appellee, under an order of the Henry Circuit Court, sold at public sale certain real estate to one of the appellants, and received the note in suit to secure the last instalment of the purchase-money. The owners of the land, and for whose benefit the sale was made, were present at the sale, and to induce Swindell to purchase the land, agreed with him before, and at the time of the sale, that if he would become the purchaser, they would pay any and all assessments and taxes made and levied upon the land for benefits to it by reason of the construction of a ditch theretofore located upon it, and that he should have and hold the land clear and

free from such tax or assessment. He relied upon that agreement and purchased the land, and they derived the benefits. Since that time he has been compelled to pay two hundred dollars, part of an assessment upon the land for that ditch.

It is insisted that whatever agreement was made with Swindell for the payment of the assessment was merged in the final contract and certificate of purchase. If the contract had been made with the appellee, that position might be correct. But it was not. It was made with the owners of the land. They were interested in the sale, and for the purpose of causing the land to sell for an increased price, made the agreement. We think that they were bound by it, and that they are liable to the purchaser for whatever sum he has paid, or may be compelled to pay, to relieve the land from assessments made upon it for the ditch.

The appellee prosecuted the action as a trustee of an express trust. A claim against him could not be set off, for the reason that he was not the real party in interest. *Flournoy v. The City of Jeffersonville*, 17 Ind. 169. We can see no reason why a claim against the beneficiary may not be set off under our practice. The trustee has no personal interest in the result of the suit. It is in the *cestui que trust*. He is the real party in interest. The action is prosecuted in the name of the trustee for his benefit.

In *Waddle v. Harbeck*, 33 Ind. 231, it was held that, in an action by a trustee of an express trust, a set-off against the beneficiary could be made. The court said, on page 235: "The reason for excluding the set-off against the trustee would make it admissible when the debt is due from the beneficiary, the 'real party in interest.'"

The judgment of the said Henry Court of Common Pleas is reversed, with costs; cause remanded to the Henry Circuit Court, with instructions to overrule the demurrer to the second paragraph of the appellants' answer, and for further proceedings, in accordance with this opinion.

J. T. Elliott, for appellants.

T. B. Redding, for appellee.

Cruzan v. Smith et al.

CRUZAN v. SMITH ET AL.

PRACTICE.—*Special Finding of Facts and Conclusions of Law.*—To present a question for review under section 341 of the code, four things must concur:

1. One of the parties must request the court to find the facts specially, with a view of excepting to the decision of the court upon the questions of law involved in the trial.
2. The court must state the facts in writing.
3. The conclusions of the court upon the questions of law arising upon the facts found must be stated, and judgment must be entered accordingly.
4. There must be an exception to the decision of the court.

EXCEPTION.—An exception is an objection taken to the decision of a court upon a matter of law.

PRACTICE.—*Special Finding.—Exception.*—When a party excepts to the decision of a court on a special finding of facts and conclusions of law thereon, he admits that the facts are fully and correctly found, but says that the court erred in applying the law to the facts found to exist. When a case is thus prepared, the only question presented for decision is, whether the court erred in applying the law to the facts found. This question is presented for review by assigning for error, that the court erred in its conclusions of law.

SAME.—The failure of a party to except to the decision of the court is not remedied by a motion for a judgment on the special finding, or for a new trial on the ground that the court erred in its conclusions of law upon the special finding. Nor is any question presented for review by excepting to the finding of the court.

SAME.—*Appeal.*—An attempt and failure of a party to perfect an appeal under section 341 of the code will not deprive him of the right of perfecting his appeal under section 352 of the code, where all the facts have not been correctly found, or where the facts found do not cover all the issues in the cause. In such case, the party must move for a new trial for the reasons assigned in the sixth clause of section 352, and put the evidence in the record by a bill of exceptions.

PRINCIPAL AND AGENT.—*General Agent.*—A general agent is one who is authorized to transact all the business of his principal, or all his business of some particular kind, or at some particular place.

SAME.—The principal is bound by the acts of a general agent, if the latter acted within the usual and ordinary scope of the business in which he was employed, notwithstanding he may have violated the private instructions which the principal may have given him; provided the person dealing with such agent was ignorant of such violation and of the fact that the agent exceeded his authority.

SAME.—The fact that the authority of an agent is limited to a particular business does not make his agency special; it may be general in regard to that business, as though its range was unlimited.

SAME.—*Special Agent.*—A special agent is one who is authorized to do one or

41	288
126	306
41	288
135	614
126	361

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137	238
137	265
41	288
140	660

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147	306

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152	137
41	288
168	31

41	288
170	344

more specified acts, in pursuance of particular instructions, or within restrictions necessarily implied from the act to be done.

SAME.—The principal is not bound by the acts of a special agent, if he exceeds the limits of his authority. And it is the duty of every person who deals with a special agent to ascertain the extent of the agent's authority, before dealing with him. If this be neglected, such person will deal at his peril, and the principal will not be bound by an act which exceeds the particular authority given.

SAME.—If a principal puts his agent in a condition to impose upon innocent third persons by apparently pursuing his authority, the principal will be bound by his acts, and he must lose in preference to such third persons.

SAME.—*Liability of Principal.*—If one who is the general agent of another in the purchase of wheat, as such agent, buys wheat to be paid for on demand at the current price at the time of demand, his principal will be liable, though the principal may have instructed his agent to buy only for cash, and though the principal may have paid the agent for the wheat, if the contract be made in good faith, upon the credit of the principal, and without any knowledge of the private instructions of the principal.

APPEAL from the Miami Common Pleas.

BUSKIRK, J.—The record in this cause presents for our consideration and decision two questions; the one involves a question of practice, and the other the merits of the cause.

The complaint was in two paragraphs. The first alleged that the appellant, on the 17th day of April, 1865, sold and delivered to the appellees, at their warehouse, in the town of Cicero, in the county of Hamilton, and State of Indiana, two hundred and sixty-two bushels and fifty pounds of wheat; that in consideration thereof the appellees promised to pay him the market price, whenever he demanded the same; that on the 10th day of November, 1865, he demanded of the appellees the sum of five hundred and twenty-one dollars and sixty-six cents, that being at the rate of two dollars per bushel, and the then market price for said wheat, which the appellees refused to pay. The second paragraph was for goods sold and delivered, and for money had and received. Bills of particulars were filed with and made a part of each paragraph. The appellees answered by the general denial.

By the agreement of the parties, the cause was submitted to the court for trial, who, at the request of the parties, ren-

dered a special finding of the facts and the conclusions of law thereon, which were in these words:

1. That the plaintiff, about the 15th of April, 1865, delivered to Scott Carson, at Cicero, Indiana, two hundred and sixty-two bushels and fifty pounds of red wheat, which was to be paid for whenever the plaintiff called for the money, and at the market price when called for; Carson, at the time he received the wheat, and before that, represented to the plaintiff and others that he was the agent of the defendants, and authorized to enter into such an agreement. The plaintiff demanded payment for the wheat during the month of March, 1866, when said wheat was worth two dollars per bushel.

2. That the plaintiff has received no pay for his wheat, neither from the defendants nor from Carson.

3. When the wheat was delivered, it was put by Carson, with other wheat of the defendants of like quality, in the warehouse, which was afterward delivered by him to the defendants at Cicero.

4. That the defendants had no knowledge that the plaintiff had stored any wheat with Carson, nor that Carson had received any wheat in store, in their name, until after they had received this wheat and paid Carson for it.

5. That James C. Thompson, in behalf of the defendants, on or about the 18th day of August, 1864, entered into an agreement with Scott Carson, in effect as follows: Smith & Thompson, the defendants, were to furnish Carson with the money to purchase wheat; also the use of the defendant Smith's warehouse and grain sacks; Carson was to purchase wheat at such prices as Smith & Thompson should give him from time to time, and to deliver it to them in the cars at Cicero, and the defendants were to pay him an advance of four or five cents per bushel over and above the price paid by him. The wheat was to be bought for cash only.

6. Carson had no other authority to bind the defendants, in the contract with the plaintiff, than what he derived from

the above agreement. Immediately after making the agreement above referred to, Carson took possession of the said warehouse, and commenced buying and delivering wheat to the defendants; that he continued in such business about nine months, during which time he bought of various persons, and put on the cars for the defendants, several thousand bushels of wheat, in which was included the wheat in controversy, that was stored with Carson; and that the defendants received all the wheat delivered in said warehouse, shipped it off, sold it, and received the proceeds thereof, without any knowledge on their part that any part of said wheat had been stored with Carson in their name; and the court further finds that the plaintiff delivered his wheat, as he believed, to the defendants, in their warehouse, in good faith, and without any knowledge whatever that Carson's instructions prohibited him from receiving said wheat in store.

Upon the foregoing facts, the court draws the following conclusions of law:

1. That Scott Carson had no authority to bind the defendants in the contract sued on, and the contract for the purchase of said wheat, made with Carson, was not binding on them.

2. The defendants, having the wheat of the plaintiff from Scott Carson, under the agreement entered into between him and them for the purchase of wheat, and having been fully paid for by the defendants to Carson, without any knowledge of the claim of the plaintiff for payment, are not liable.

3. The defendants are not liable in this action, and the finding is in their favor for costs.

Judgment for the defendants for costs.

Immediately following the above special finding is the following entry in the record:

"To which finding of the court the plaintiff excepts, and moves the court for a new trial, and files written causes in these words: The plaintiff moves the court for a new trial of this cause for the following reasons: first, the findings of

the court are not sustained by sufficient evidence; second, the findings of the court are contrary to law; third, the findings of the court do not embrace all the facts in the case, as disclosed by the pleadings and evidence; fourth, the court erred in its conclusions of law upon the facts in this case, in this, that the findings should have been in favor of the plaintiff in the place of the defendants."

The motion for a new trial was overruled, and the appellant excepted.

It is earnestly maintained by the appellees that the correctness of the decision of the court upon the special finding of facts is not presented by the record. The solution of this question involves an examination of the statute and the adjudged cases in this court. Section 341 of the code provides for a special finding of facts, and the decision of the court upon such facts, and reads as follows:

"Sec. 341. Upon trials of questions of fact by the court, it shall not be necessary for the court to state its finding, except generally, for the plaintiff or defendant, unless one of the parties request it, with the view of excepting to the decision of the court upon the questions of law involved in the trial, in which case the court shall first state the facts in writing, and then the conclusions of the law upon them, and judgment shall be entered accordingly." 2 G. & H. 207.

To present a question for review in this court, under the above section of the statute, four things must concur; first, one of the parties must request the court to find the facts specially, with the view of excepting to the decision of the court upon the questions of law involved in the trial; second, the court must state the facts in writing; third, the conclusions of the court upon the questions of law arising upon the facts found must be stated, and judgment must be entered accordingly. There must be an exception to the decision of the court. The exception is not to the finding of the court upon questions of fact, but to the conclusions of law drawn by the court upon the facts found. Section 342 of the code defines an exception to be "an objection taken to

the decision of the court upon a matter of law." 2 G. & H. 208.

When a party excepts to the decision of the court, he admits that the facts are correctly and fully found, but says that the court erred in applying the law to the facts found to exist. When a case is thus prepared for this court, there is but a single question of law presented for our decision, and that is, whether the court erred in applying the law to the facts found, and such question is presented for review here by assigning for error that the court erred in its conclusions of law.

This is neither a new nor open question in this court, but the correct practice under section 341 does not seem to be well understood by the profession generally. A construction has been placed upon the section of the code under examination in the following cases: *Williams v. The New Albany and Salem R. R. Co.*, 5 Ind. 111; *Myerson v. Neff*, 5 Ind. 523; *Addleman v. Erwin*, 6 Ind. 494; *Spencer v. Russell*, 9 Ind. 157; *The Indianapolis Insurance Co. v. Mason*, 11 Ind. 171; *Peden's Adm'r v. King*, 30 Ind. 181; *Grimes v. Duzan*, 32 Ind. 361; *Smith v. Jeffries*, 25 Ind. 376; *Schmitz v. Lauferty*, 29 Ind. 400. In the two cases last cited, it was expressly held by this court, that "the exception must be taken to the conclusion of law upon the facts found, and not to the finding."

Nor will the failure of the party to except to the decision of the court be remedied by a motion for a judgment upon the special finding, or for a new trial on the ground that the court had erred in its conclusions of law upon the special finding. *Peden's Adm'r v. King*, *supra*.

In the case under consideration, the exception was to the finding of the court. There was no exception to the decision of the court, and consequently no question is properly presented for our decision under said section of the code.

We are next to inquire whether a party who has attempted, but failed, to bring his case into this court under section 341 can move for a new trial on the ground that the finding was

not sustained by sufficient evidence, and put the evidence into the record by a bill of exceptions, and thus require us to determine whether the court erred in overruling the motion for a new trial. The previous rulings of this court, in the cases above cited, seem to hold that the attempt and failure of a party to perfect an appeal under section 341 will not deprive him of the right of perfecting his appeal under section 352 of the code, where all the facts have not been correctly found, or where the facts found do not cover all the issues in the cause. But in such case the party must move for a new trial for the reasons specified in the sixth clause of section 352, which are, "that the verdict or decision is not sustained by sufficient evidence, or is contrary to law," and put the evidence in the record by a bill of exceptions.

GREGORY, C. J., in speaking for the court in *Schmitts v. Lauferty*, *supra*, says: "It is claimed by the appellee that the main question in this case is not presented; that the appellant ought to have excepted to the conclusions of law, and that a motion for a new trial is not the proper mode of reaching it. When the evidence is not made a part of the record, and the case is prepared for this court under the three hundred and forty-first section of the code, 2 G. & H. 207, a motion for a new trial is not the mode of reaching an error of the court below in its conclusions of law. *Smith v. Jeffries*, 25 Ind. 376. But if the 'decision is not sustained by sufficient evidence, or is contrary to law,' then the case is within the sixth specification of section 352 of the code, 2 G. & H. 212, and a motion for a new trial is proper."

It was held by this court, in *Peden's Adm'r v. King*, *supra*, that "to prepare a case for this court under section 341 of the code, the court below should 'first state the facts in writing, and then the conclusions of the law upon them,' to which the party aggrieved enters his exception. When the finding covers the issues, and the court has passed on all the facts involved in the case, the question is not saved by a motion for a new trial, or for judgment on the special finding."

We proceed to inquire whether the court found correctly

all the facts, and whether the facts so found covered all the issues in the case. The first paragraph of the complaint alleged that the plaintiff had sold and delivered to the defendants certain wheat, upon terms stated. The second paragraph was for goods sold and delivered, and for money had and received.

The court did not find whether the plaintiff sold and delivered any wheat to the defendants, but in the first and sixth findings found that the plaintiff had delivered certain wheat to Scott Carson, who was acting as the agent of the defendants; and in the fourth finding the court found that the plaintiff stored certain wheat in the warehouse of the defendants. We have carefully examined the evidence in the record, and are entirely satisfied that the court did not find the facts correctly, and that the facts so found did not cover the issues in the case. The issues in the case were, whether the plaintiff had sold and delivered to the defendants certain wheat, and whether they had paid therefor. The fact found by the court was, that the plaintiff had stored certain wheat in the warehouse of the defendants. There is nothing disclosed in the evidence about storing wheat, but it was clearly and conclusively proved that the plaintiff had sold and delivered to Scott Carson certain wheat; that Carson had mixed such wheat with other wheat belonging to the defendants, and had delivered the same to the defendants, who had shipped and sold the same, and had received the money therefor, and that they had paid Carson for such wheat, who had failed to pay the plaintiff therefor. The only controversy in the case was, whether, upon the facts, the defendants were liable to the plaintiff for the value of such wheat. The court seems to have decided the case upon the liability of the defendants as warehousemen, and not as purchasers. The law, as applied to warehousemen, is very different from that by which the liability of purchasers is governed. The facts in the case not having been correctly found, and as such finding did not cover all the issues in the case, and the court having applied

Cruzan v. Smith et al.

the wrong principle of law to the facts of the case, we proceed to determine whether the court erred in overruling the motion for a new trial.

The facts, as shown by the evidence, are as follows: The appellees employed Scott Carson to purchase wheat for them, at the town of Cicero, in the county of Hamilton, and State of Indiana, on commission; they furnished him with the use of a warehouse and the grain sacks which belonged to one of them; that the appellees being conductors on a railroad that passed through said town, they, from time to time, furnished Carson with money to pay for wheat by him purchased, and with newspapers containing the current market price of wheat; that the appellees gave Carson private instructions to purchase for cash only; that Carson took possession of the warehouse, which had the name of Smith, one of the appellees, over the door, and used sacks furnished by the appellees, the most of which were marked S. & T.; that Carson continued to purchase wheat for about nine months; that the appellees passed the said town on trains of cars nearly every day in the week except Sunday, and nearly every time they passed they conversed with Carson, frequently gave him money and slips containing the list of prices; the appellees very frequently spoke of Carson as their agent, and during the nine months that Carson was engaged in buying wheat, he made contracts in the name of the firm of Smith & Thompson, gave receipts as their agent, and on all occasions held himself out as such agent; Carson, as such agent, purchased of the appellant two hundred and sixty-two bushels and fifty pounds of wheat, and agreed to pay him on demand the market price of such wheat at the time of demand. The appellant, in good faith, believing that Carson was the agent of the appellees, sold the wheat on their credit, without any knowledge of the instructions of the appellees to Carson to purchase for cash only, and not on credit; the appellees received the wheat purchased of appellant, and sold the same and received the proceeds of the

sale, as they did with the other wheat purchased by Carson for them; the appellees paid Carson for all the wheat he put on the cars for them, and while it does not appear that the appellees had any knowledge that the wheat purchased of appellant was bought on credit, they must have known that Carson had purchased on credit the wheat of some person, for they received more wheat than could have been purchased with the money they had furnished. It was also shown that Carson purchased wheat of several other farmers, on the same terms and conditions on which he had purchased the wheat of the appellant.

If the facts above stated constitute Carson the general agent of the appellees in the purchase of wheat for them at Cicero, in Hamilton county, Indiana, they are liable to the appellant for the value of the wheat so sold and delivered; but if, under the facts stated, Carson was only the special agent of the appellees, then they are not liable.

The distinction between a general and special agent is very accurately and correctly stated by Mr. Wait, in his work on Law and Practice, vol. 1, p. 215, where it is said: "A general agent is one who is authorized to transact all the business of his principal, or all his business of some particular kind, or at some particular place. The principal will be bound by the acts of a general agent, if the latter acted within the usual and ordinary scope of the business in which he was employed, notwithstanding he may have violated the private instructions which the principal may have given him, provided the person dealing with such agent was ignorant of such violation and that the agent exceeded his authority. *Munn v. Commission Co.*, 15 Johns. 44; *Jeffrey v. Bigelow*, 13 Wend. 518. The authority of an agent being limited to a particular business does not make it special; it may be as general in regard to that, as though its range were unlimited. *Anderson v. Coonley*, 21 Wend. 279. A special agent is one who is authorized to do one or more specific acts, in pursuance of particular instructions or within restrictions nec-

essarily implied from the act to be done. The principal is not bound by the acts of a special agent, if he exceeds the limits of his authority. And it is the duty of every person who deals with a special agent to ascertain the extent of the agent's authority before dealing with him. If this is neglected, such person will deal at his peril, and the principal will not be bound by any act which exceeds the particular authority given."

STORY, in his work on Agency, states the law thus: "Whatever acts are usually done by such class of agents, whatever rights are usually exercised by them, and whatever duties are usually attached to them, all such acts, rights, and duties are allowed to be incidents to the authority confided to them in their particular business, employment, or character."

The above authorities are much in point, and, in our opinion, clearly establish that Carson was the general agent of the appellees in the purchase of wheat at the town of Cicero, in said county and state.

But it is insisted by the appellees, that whether Carson was the general or special agent, he was acting under special instructions, and that if he exceeded the instructions of his principals, they are not bound by his acts. This position is not sustained by authority. In *Edwards v. Schaffer*, 49 Barb. 291, the court say: "If a general agent disregards his specified instructions, he will be liable therefor to his principal, but his acts are nevertheless binding on the principal as regards third parties, without notice of such instructions."

The rule is stated in 2 Kent Com. 620, thus: "The acts of a general agent, or one whom a man puts in his place to transact all his business of a particular kind, will bind his principal, so long as he keeps within the general scope of his authority, though he may act contrary to his private instructions; and the rule is necessary, to prevent fraud and encourage confidence in dealing."

But the precise point under examination has been considered and decided by this court, and such decisions are fully

supported on principle, and by the adjudged cases in other states.

In *Manning v. Gasharie*, 27 Ind. 399, this court say: "It is well settled that the acts of a general agent, with reference to the subject of the agency, will bind his principal, although he may have received private instructions narrowing or withdrawing his authority, unless such instructions are known to the party dealing with him."

The case of *Stapp v. Spurlin*, 32 Ind. 442, resembles the case under consideration in many respects. That was an action by Spurlin against Stapp & Co., to recover the value of certain wheat sold and delivered to Andrews, as the agent of Stapp & Co. The defence was the same as in this case. It was in the first place contended that Andrews was not an agent of the defendants; and in the next place it was insisted that if Andrews was an agent, his principals were not liable, because he was not authorized to purchase wheat on credit, and they had furnished him with money to pay for all the wheat he had purchased. The court held, upon the facts of the case, that Andrews was the agent of Stapp & Co. for the purchase of wheat at the point named. In reference to the defence that Andrews was not authorized to purchase on credit, and that the principals had settled with and paid the agent for all the wheat he had purchased and shipped, without any knowledge that he had not paid for said wheat, the court say: "Andrews was the agent of the appellants in the purchase of the wheat, and if they furnished him with the money to pay for it, and he failed to do so, it was not the fault of Spurlin, and the default of their own agent can furnish the appellants no defence to this suit. Their remedy is against the agent."

Again the court say: "But it seems very clear that the instruction asked by the appellants was properly refused, because it is not law. It seeks to charge the appellee with the consequences of the misconduct and bad faith of the appellants' agent in his relations with them. If they

furnished the agent with money to pay for the wheat, it was his duty to make the payment, but if he failed to do so, and converted the money to his own use, it was simply a violation of the trust and confidence reposed in him by his principals, and as they trusted him to act for them, as between them and one who has dealt with him as their agent, in good faith, they must suffer the consequences of his bad faith with themselves."

The Supreme Court of New York, in the case of *Reynolds v. Kenyon*, 43 Barb. 585, says: "As between a principal who has put it in the power of his agent to misappropriate the funds of the principal, and a third party dealing in good faith with the agent in a matter within the general scope of his authority, a loss resulting from a misappropriation should fall upon the former."

Mr. Wait states the law as follows: "It is a universal rule, based upon principles of policy, propriety and justice, that if a principal puts his agent in a condition to impose on innocent third persons, by apparently pursuing his authority, the principal will be bound by his acts, and he must lose in preference to such third persons. *Dunning v. Roberts*, 35 Barb. 463; *Cook v. Adams*, 1 Bosw. 497; *North River Bank v. Aymar*, 3 Hill, 263; *Farmers, etc., Bank v. Butchers, etc., Bank*, 4 Kern. 623; S. C. 2 E. P. Smith, 125."

There is an unbroken current of authority, both in England and in this country, in support of the principles above stated; and we are very clearly of opinion that under the facts of this case Carson was the general agent of the appellees in the purchase of wheat; that his contract with the appellant was within the general scope of his authority, and rendered his principals liable; that the facts that he had violated his private instructions, and that the appellees had fully paid him for the wheat by him delivered to them, constitute no defence, where the contract was made, as in this case, in good faith upon the credit of the principals, and without any knowledge of the private instructions of the principals to the

Nave v. Ritter.

agent; and that the court erred in overruling the motion for a new trial.

The judgment is reversed, with costs; and the cause is remanded, with directions for further proceedings in accordance with this opinion.

D. Moss, for appellant.

N. O. Ross and *R. P. Effinger*, for appellees.

NAVE v. RITTER.

41	301
143	372

COUNTY COMMISSIONERS.—*Allowance to Clerk for Extra Services.*—Before county commissioners can make an allowance to a clerk, under the provisions of the act of 1861 (2 G. & H. 652), the clerk must take and subscribe an oath or affirmation to the truth of his charges. Subscribing his name to the charges is in no sense subscribing to the oath or affirmation.

SAME.—A certificate of the auditor, that the claim so subscribed has been "subscribed and sworn to in open court," is not sufficient; it does not show that the clerk has subscribed and sworn to the truth of the charges.

APPEAL from the Hendricks Common Pleas.

WORDEN, J.—Levi Ritter, the appellee, filed his claim before the board of commissioners of Hendricks county, as follows:

"HENDRICKS COUNTY, INDIANA.

"To Levi Ritter, Dr.

"For services rendered for said county, and for which said county is liable to pay, in the following sums, to wit: for keeping a registry of county and township officers for eight years, commencing July 26th, 1860, and ending July 26th 1868, four dollars per annum, thirty-two dollars.

"[Signed:]

LEVI RITTER."

Appended to the claim is the following certificate:

"Subscribed and sworn to in open court this 7th day of September, 1871.

WM. M. HESS, A. H. C."

Nave v. Ritter.

The board allowed the claim to the amount of twenty-four dollars, at the rate per annum specified, deducting two years from the specified time on the ground that for those years Ritter had been allowed in full for extra services.

From the allowance thus made by the board, Christian C. Nave, the appellant herein, took an appeal to the court of common pleas, where he moved to dismiss the claim on the grounds, amongst others, that it was "not dated and itemized," and that the claimant, Ritter, "had not taken and subscribed an oath or affirmation to the truth of the claim."

The motion was overruled, and the appellant excepted. Such further proceedings were had as that judgment was rendered affirming the order of the board of commissioners, and dismissing the appeal at the costs of the appellant.

Error is assigned upon the ruling in question.

The act of 1861, 2 G. & H. 652, provides, "that the board of county commissioners shall annually allow the clerk and sheriff of their respective counties an annual compensation for extra services as such, not exceeding one hundred dollars each; but no such allowance shall be made to either of those officers until he shall have filed a detailed statement of his charges, with items and dates, and taken and subscribed an oath or affirmation to the truth thereof. The board may then make such reasonable allowance as they deem proper, but in no event to exceed the sum above named; which allowance shall be in full of all compensation for extra and other services where no certain fee is fixed by law."

We are of opinion that the claim filed did not meet the requirements of the statute above quoted. The objection, that items and dates are not given, seems to have some foundation. The details of keeping the registry, it seems to us, could have been stated, giving the items and dates more specifically, as required by the statute. But, however this may be, the affidavit is not such as the statute requires. The statute peremptorily requires the clerk or sheriff to take and subscribe an oath or affirmation to the truth of his charges. Here he has not subscribed any oath or affirma-

 Bassett v. The State.

tion at all. He subscribed the charges, but not the oath or affirmation. The subscribing of his name to the charges is in no sense whatever the subscribing of the oath or affirmation. Again, it does not appear that he swore to the truth of his charges.

It appears, by the appended certificate of the auditor, that the claim was "subscribed and sworn to in open court," but this does not convey any very exact idea of what was sworn to in relation to the claim.

The judgment below is reversed, with costs, and the cause remanded, with leave to the parties to amend.

C. C. Nave and *C. A. Nave*, for appellant.

W. A. McKenzie, for appellee.

41	303
124	383

BASSETT v. THE STATE.

CRIMINAL LAW.—*Abortion, Attempt to Produce.*—Statute.—The statute makes an attempt to produce miscarriage a criminal act, unless the miscarriage is necessary to save the life of the woman.

SAME.—*Indictment.*—An indictment for an attempt to procure an abortion charged that an instrument was used to produce a miscarriage, "the employment of said instrument not being necessary to preserve the life of the woman," without alleging that the miscarriage was not necessary to save the life of the woman.

Held, that the indictment should have been quashed on motion.

APPEAL from the Marion Criminal Circuit Court.

OSBORN, J.—The appellant was indicted in the Marion Criminal Circuit Court for attempting to procure an abortion. There are two counts in the indictment. One charges that the appellant did, on a day named, etc., unlawfully and wilfully employ a certain instrument, naming it, upon the body of Jennie Gerry, who was then and there a pregnant woman, by then and there inserting it into the uterus of the said Jennie

Gerry, and passing it about the foetus, and attempting to break its attachments to the womb, with intent, then and there and thereby, to produce the miscarriage of the said Jennie Gerry, "the said employment of the said instrument not being then and there necessary to preserve the life of the said Jennie Gerry."

The second count is like the first, except that it omits the words, "who was then and there a pregnant woman," and in their place the following words are used, "who was then and there supposed by said defendant to be a pregnant woman."

The defendant moved the court to quash the indictment, which was overruled, and he excepted. He then pleaded not guilty. There was a jury trial, with a verdict of guilty, and that he should be fined in the sum of five hundred dollars, and be imprisoned in the county jail one year. He moved the court for a new trial, and in arrest of judgment, both of which motions were overruled, and exceptions were taken at the proper time. Judgment was then pronounced against him, on the verdict of the jury.

The indictment was founded upon 2 G. & H. 469, sec. 36. We quote so much of that section as is necessary to show upon what the indictment was founded: "Every person who shall wilfully administer to any pregnant woman, or to any woman whom he supposes to be pregnant, anything whatever, or shall employ any means with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life," etc.

We think it was the purpose of the legislature to make, and that the statute does make, the attempt to procure the miscarriage a criminal act, unless such miscarriage was necessary to preserve life; whilst the charge in the indictment makes the offence to consist in the unnecessary employment of a particular instrument to procure that result, without regard to its necessity.

Under the indictment in the record before us, the defendant might have been convicted, although the miscarriage, to

 Davis v. Perry *et al.*

procure which the instrument was used, was absolutely necessary to save the life of the woman.

We have been referred to *The State v. Vawter*, 7 Blackf. 592, as sustaining the ruling of the court below. The question was not made in that case. The only point decided in that case was, that it was not necessary to name the medicine used, or that it was noxious.

The said judgment of the said Marion Criminal Circuit Court is reversed, and cause remanded, with instructions to said court to quash said indictment.

J. W. Gordon, T. M. Browne, R. N. Lamb, and J. N. Kimball, for appellant.

J. C. Denny, Attorney General, R. P. Parker, and J. B. Elam, for the State.

41	305
195	89

 DAVIS v. PERRY ET AL.

PRACTICE.—Demurrer.—Defective Record.—Where a demurrer has been sustained to a complaint, and the demurrer does not appear in the record, if for any cause reached by demurrer the complaint is defective, the ruling will be affirmed.

REVIEW OF JUDGMENT.—Complaint.—Record.—A complaint to review a judgment must be accompanied by a full record of the proceedings sought to be reviewed.

SAME.—Demurrer.—Waiver.—The questions as to the jurisdiction of the court over the subject-matter of the action, and as to the sufficiency of the complaint, are not waived by a failure to make the objection or to except, so as to prevent a review of the proceedings and judgment for either of these causes.

APPEAL from the White Common Pleas.

DOWNNEY, J.—This was an action to review a judgment of the same court for alleged apparent errors. Without reciting the pleadings, the facts may be stated as follows: On the 13th day of September, 1865, Perry recovered a judgment against Hauser and wife, foreclosing a mortgage, which they had ex-

Davis v. Perry et al.

ecuted to him on certain real estate to secure the payment of several promissory notes executed by Hauser to Perry, payable without relief from valuation laws. The judgment of the court ascertained the amount due on the notes, directed the sale of the mortgaged premises, without relief from valuation laws, and provided, that if the proceeds were not sufficient to pay the debt and costs, the plaintiff should have execution against any other property of said defendant Hauser, subject to execution. There was no personal judgment against Hauser, unless the latter clause of the judgment amounted to such a judgment. And it was not provided that the property of the defendant, other than the mortgaged premises, should be sold without relief from valuation laws, unless it was to be implied from the fact that the mortgaged premises were to be so sold. The mortgaged premises were sold according to the judgment, but did not produce money enough to pay the debt and costs. The sheriff then advertised and sold another tract of the defendant Hauser's land, without relief from valuation laws, which was purchased by Davis for fifty dollars. Davis paid the amount of his bid and took the sheriff's deed. Perry then instituted a proceeding against Hauser, Davis, and Sill, the sheriff, for the purpose of correcting and extending the judgment so as to make it a personal judgment against Hauser, and to authorize the sale of his property other than the mortgaged premises, without relief from valuation laws, and also to have the sale made by the sheriff to Davis set aside and declared void. No offer was made to refund to Davis the amount paid by him for the real estate purchased by him. There was a motion made by Davis to have this case certified to the circuit court, for want of jurisdiction in the common pleas to try the question of the validity of his title to the real estate purchased by him, which was overruled by the court. Also a demurrer to the complaint, which was also overruled. Judgment was rendered in favor of Perry, correcting and extending the original judgment, so as to make it a personal judgment, and to authorize the sale of

property without relief from valuation laws, and setting aside the purchase made by Davis. On this corrected or modified judgment, Perry took out a new execution, on which he had the sheriff re-sell the land previously purchased by Davis, and he himself became the purchaser thereof.

The case now under consideration was instituted to review and set aside this last judgment; and it is alleged, after reciting the facts, that the judgment is erroneous, because,

First. The title to real estate was in issue, as appears from the complaint of Perry, and, therefore, the court had no jurisdiction.

Second. Because the court overruled the demurrer of Davis to the complaint in that case, the demurrer being to the jurisdiction of the court on account of the title to real estate being in issue.

Third. The court erred in refusing to certify that cause to the circuit court, on account of the title to real estate being in issue.

Fourth. In not making it a part of the judgment, that the said Davis should be placed *in statu quo*, by ordering the payment to him of the fifty dollars which he paid to the sheriff in the purchase of the said real estate.

Fifth. And in sustaining the demurrer to the answer of Davis, in which he alleged that Hauser had notice of the defects in the judgment referred to in the complaint of Perry, and waived said defects, and consented to the sale of said real estate without relief from valuation laws, as though there had been a personal judgment.

The record says that a demurrer was filed by the defendant Perry to the complaint, but it is not set out in the record, and the clerk states, in the part of the record where it should have been set out, that it is "lost or mislaid, and cannot be found." No steps have been taken to supply its place in the record. We cannot, therefore, say what the grounds of objection to the complaint were, or that the demurrer was not properly sustained to the complaint. We

Crowell *et al.* v. The City of Peru *et al.*

must not be held responsible when counsel submit their records to us with such fatal defects in them.

It is necessary that a complaint to review a judgment under the code, as well as by the former practice in courts of chancery, shall embody or be accompanied by a full record of the proceedings and judgment sought to be reviewed. *McDade v. McDade*, 29 Ind. 340.

The complaint in this case does not conform to this rule. We may presume that the demurrer was for this cause, and it was, therefore, properly sustained by the court. *Crowell v. The City of Peru*, *infra*, on this page.

It is urged by the appellee that the judgment in question cannot be reviewed, because there was no exception to the rulings of the court in that case. Conceding that this position is correct as to other questions, it cannot be true as to the questions of the jurisdiction of the court of the subject-matter of the action, or that the complaint does not state facts sufficient to constitute a cause of action. These questions are not waived by failing to make the objection, or to except. *Train v. Gridley*, 36 Ind. 241, and 2 G. & H. 81, sec. 54.

The judgment in this case is affirmed, with costs.

E. Hughes, A. W. Reynolds, C. H. Test, D. V. Burns, and G. S. Wright, for appellant.

D. P. Baldwin and W. C. Lamb, for appellees.

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125	89
41	308
152	556

CROWELL ET AL. v. THE CITY OF PERU ET AL.

PRACTICE.—Demurrer.—Appeal.—Where a demurrer has been filed and overruled, and the demurrer does not appear in the record, the court will presume it was overruled on account of its own defects, or because it presented some objection to which the pleading was not liable. The rule would probably be different where the demurrer was sustained, and it appeared that the pleading was not liable to a demurrer for any cause.

APPEAL from the Miami Common Pleas.

DOWNEY, J.—Complaint by the appellants, owners of taxable property within the city of Peru, against the city and the city treasurer, to enjoin the collection of certain taxes levied by the city, and which the treasurer was about to collect. An injunction was granted, to continue until a designated day. There was an answer filed by the defendants, to which the plaintiffs filed a demurrer, which the court overruled, rendered judgment thereon for the defendants, and dissolved the injunction. This action of the court is assigned as error.

The demurrer is not set out in the record. When a demurrer has been filed and overruled, and the record does not contain the demurrer, we may well presume that it was overruled on account of its own defects, or because it presented some objection to the pleading to which it was not liable. If the demurrer has been sustained, and the pleading is not liable to any objection which could have been specified in the demurrer, the rule would probably be different. The injunction, by its terms, was to extend until the 11th day of December, 1871. The order dissolving it was not made until the 18th day of that month. As it had already expired, it was not error to declare it dissolved. Besides this, the bill of exceptions does not show on what ground it was dissolved. It is for the appellants to show the existence of the errors upon which they rely. This they have not done. The presumption is that there was no error.

The judgment is affirmed, with costs.*

J. U. Pettit, J. L. Farrar, A. B. Charpie, and A. Taylor,
for appellants.

N. O. Ross and R. P. Effinger, for appellees.

*Petition for a rehearing overruled.

Maynard *et al.* v. Black.

MAYNARD ET AL. v. BLACK.

PRACTICE.—*Striking Out.*—There is no error in striking out one paragraph of an answer, where the evidence admissible under such paragraph can be introduced under a remaining paragraph of such answer.

PROMISSORY NOTE.—*Payment to Third Person.*—In a suit by the payee of a promissory note against the maker, an answer alleging payment to a third person, without showing any authority in such person to receive such payment, is bad on demurrer.

PRACTICE.—*Discharge of Jury.*—A discharge by the court of a jury, because one member thereof is unable to attend, although both parties desire to proceed with the remaining eleven jurors, does not work a discontinuance of the case, or render invalid a trial at a subsequent term.

INSTRUCTIONS TO JURY.—It is error for the court to charge that the plaintiff is entitled to recover unless the defendant has proved the allegations in two independent and sufficient paragraphs of the answer.

APPEAL from the Madison Common Pleas.

WORDEN, J.—Action by the appellee against the appellants upon a promissory note, executed by the latter to the former. Issue, trial, verdict and judgment for the plaintiff, a new trial having been refused, and exception taken.

The defendant Maynard, who seems to have been principal in the note, answered in eight paragraphs. The first was the general denial, and the others set up new matter. The court, on motion of the plaintiff, struck out the third, and this is complained of as error. We have compared the paragraph thus stricken out with the second paragraph, and are of opinion that they were substantially alike, and that the evidence necessary to support the paragraph stricken out could have been adduced under the second; hence there was no error in this ruling.

A demurrer was sustained to the fourth and sixth paragraphs of the answer, for want of facts sufficient, etc., and exception was taken. These paragraphs set up, in substance, with some variation in the manner of statement, the payment and satisfaction of the note to one Ellen McIntire, formerly Ellen James, without stating any authority or right in her to receive such payment or satisfaction. The paragraphs

were, for this reason, bad, and the demurrer was correctly sustained.

It is complained of as error that the plaintiff took, without leave of the court, and used on the trial, the depositions of Alexander and Ellen McIntire, the defendants having previously taken such depositions. Whatever, if any, foundation there may be in law to this objection, there is none in fact, for we find, on recurring to the record, that the plaintiff obtained the leave of the court to take such depositions before the same were taken by him.

At a term of the court before that at which the trial was had, which resulted in a verdict and judgment for the plaintiff, a jury was impanelled to try the cause, and a part of the evidence was heard, when, upon one of the jurors being unable to attend, the court discharged the jury, though both parties were willing to proceed with eleven jurors only. This is complained of as being erroneous. This action of the court did not work a discontinuance of the cause, and if erroneous, did not prevent the subsequent trial thereof.

The court gave the following instruction, which was duly excepted to by the defendant, and was, amongst other things, made the ground of the motion for a new trial:

"This is an action brought upon a promissory note executed by defendants to the plaintiff, and the execution of the note not being denied by the defendants under oath, the note proves itself; and if the jury find, from the evidence, that the said note in suit was given for a valuable consideration, and that the consideration has not wholly failed since the execution of said note, and that the same has not been fully paid off by said defendants, and accepted by said plaintiff, then your finding should be for the plaintiff, unless you furthermore find the allegations in the seventh and eighth paragraphs of answer to be true."

This instruction is clearly erroneous. The seventh and eighth paragraphs of the answer set up different grounds of defence. They were not challenged by demurrer, nor was their validity in any way questioned. No objection to either

The Lafayette and Indianapolis Railroad Company *et al.* v. Pattison.

is urged here. We take them to be good. If either was found to be true, the defendant was entitled to a verdict. It was not necessary, in order to defeat the right of the plaintiff to a verdict, that the allegations of both paragraphs should be found to be true, as stated in the instruction. There may have been an inadvertence, in preparing the instruction, in using the word "and" instead of "or," but we can by no means say that the charge as given did not mislead the jury. For this error the judgment will have to be reversed.

There are some other questions made, arising upon the motion for a new trial, but as they may not arise upon another trial, we pass them.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

W. R. Pierse and H. D. Thompson, for appellants.

J. W. Sansberry, for appellee.

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THE LAFAYETTE AND INDIANAPOLIS RAILROAD COMPANY ET
AL. v. PATTISON.

MONEY PAID UNDER MISTAKE OF LAW.—*Voluntary Payment.—Controlling Necessity.—Duress.*—It is well settled by the current of authority, that where money is paid with a full knowledge of all the facts and circumstances upon which it is demanded, or with the means of such knowledge, it cannot be recovered back upon the ground that the party supposed he was bound in law to pay it, when in truth he was not. Nor can money voluntarily paid upon demand, though the demand be unjust, be recovered back where the party paying has full knowledge of all the facts. But if there be a controlling necessity in the case, arising from the peculiar circumstances under which the money is demanded, the rule does not apply. This controlling necessity may arise from duress as applied to the property, as well as to the person, and where one person is in possession of the goods or property of another, and refuses to deliver the same up to that other, unless the latter pays him a sum of money which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment by

The Lafayette and Indianapolis Railroad Company *et al.* v. Pattison.

compulsion, and may be recovered back. So, if the property be not actually in the possession of a person, but he has such control over it as to give him an undue advantage over another, and money is therefore paid to remove such control, or if thereupon it is agreed between the parties that if the money is so paid, it shall not be regarded as a voluntary payment and may be recovered back if the party paying is otherwise entitled to recover, such recovery may be had.

CONTRACT.—Shipment of Cattle.—Freight in Excess of Contract Paid Under Protest.—Recovery of Excess.—During the rebellion, A. had a contract to furnish the government with a certain number of beef cattle during two months, and for the purpose of filling such contract went to Chicago and made a contract with a railroad company to ship cattle for him to Indianapolis at sixty-five dollars per car; and leaving an agent to ship, he returned to Indianapolis to receive the cattle. The cattle of the first shipment of two car loads were sent to the cattle yard of A., and after a few days a bill for two hundred and one dollars and two cents was sent to A., which he refused to pay, and informed the agent of the railroad company that he had a contract for the shipment at sixty-five dollars per car; the agent denied knowledge of any such contract, and insisted that the bills must be paid as presented, and that he would not deliver any future car loads of cattle until the freight was paid, as he made it up from the way-bills, and that the bill included other things besides freight, which he could not itemize. It was agreed that A. should pay under protest, and also future freight, and the cattle should be delivered as they arrived, and A. should reserve the right to recover any sum so paid unjustly. In pursuance of this agreement, the agent delivered the cattle at the yard of A. as they arrived from time to time, and as soon as the bills were prepared they were paid by A.

Held, that the payments were not voluntary, and that A. could recover all sums so paid in excess of his contract price.

APPEAL from the Marion Circuit Court.

BUSKIRK, J.—This was an action by the appellee against the appellants to recover alleged overcharges for freight paid by him to the appellants on cattle shipped from Chicago, Illinois, to Indianapolis, Indiana.

The complaint was in two paragraphs. The first paragraph alleged that the defendants were indebted to the plaintiff in the sum of two thousand dollars for money had and received by the defendants for the use of the plaintiff, which remained due and unpaid.

The second paragraph of the complaint alleged, in substance, that the defendants owned, controlled, and operated different railroads extending from different points, but con-

The Lafayette and Indianapolis Railroad Company *et al.* v. Pattison.

stituting one continuous line between Chicago and Indianapolis, and were engaged in shipping freights, cattle, etc., between the said cities at established rates of freight; that the customary rates for shipping cattle on and over said roads, and between said cities, was fifty dollars per car; that defendants undertook and agreed to ship over said roads, between said cities, a large number of car loads of cattle for the plaintiff at customary rates of charges; that plaintiff delivered to defendants at Chicago twenty-one car loads of cattle, to be shipped over said roads to Indianapolis, at customary rates, and defendants transported said twenty-one car loads from Chicago to Indianapolis, but instead of charging plaintiff customary rates, they extorted from him one hundred and twelve dollars per car load, and refused to deliver such cattle to the plaintiff at Indianapolis unless he would pay such unreasonable and extortionate charges; that thereupon the plaintiff offered to pay reasonable and customary charges, and demanded his cattle, which the defendant refused; that said cattle were dying in the cars, and the plaintiff was compelled to and did pay such extorted and immoderate rates, in order to save the lives of his cattle and prevent great damage to himself; that he paid said extorted and improper charges under protest, and with the understanding that should said sum be found to be over the customary rates for shipping such stock over said roads, he reserved the right to recover the amount so extorted from him; that the plaintiff paid the defendants, in the manner aforesaid, for shipping said twenty-one (21) car loads of cattle, the enormous sum of two thousand three hundred and sixty-five dollars and ninety cents (\$2,365.90), which he avers was one thousand three hundred and fifteen dollars and ninety cents more than the usual and customary rates for shipping stock over the said roads between the said cities; and that the defendant thereby wrongfully, unjustly, and without right extorted from him said sum of one thousand three hundred and fifteen dollars and ninety cents, which sum is justly due

from said defendants to the said plaintiff, and which they refuse to pay, although often requested so to do.

The defendants demurred separately to each paragraph of the complaint; but the demurrer was overruled, and the defendants excepted, and this ruling is assigned for error.

The learned counsel for appellants have been unable to point out any valid objection to the complaint; and not having discovered any, we conclude that the complaint was good, and that the action of the court in overruling the demurrer thereto was eminently proper.

The defendants answered by the general denial. The cause was submitted to a jury for trial, and resulted in a finding for the plaintiff in the sum of nine hundred dollars. The court overruled the defendants' motion for a new trial, and rendered final judgment on the verdict, to which rulings proper exceptions were taken.

The appellants have assigned for error eleven causes. The first and eleventh are valid. The first is for overruling the motion for a new trial. The eleventh is for overruling the demurrer to the complaint, which has been disposed of. The other nine are the reasons assigned for a new trial and are covered by the first assignment.

It is contended by the appellants that the court erred in overruling the motion for a new trial, for the following reasons:

First. Because the payments made by the plaintiff were voluntary, and cannot be recovered back.

Second. That the damages assessed were excessive.

Third. That the court erred in giving instructions to the jury numbered 1, 2, 4, and —.

Fourth. That the court erred in suppressing the 1st, 2d, and 3d questions of the cross examination by plaintiff in the deposition of Thomas Hoop.

Fifth. That the court erred in sustaining the motion of plaintiff to suppress the re-direct interrogatory by defendants to Homer E. Sargent, and his answer thereto in the deposition of said Sargent.

The Lafayette and Indianapolis Railroad Company *et al.* v. Pattison.

Sixth. Because the verdict is not sustained by the evidence.

The first question which we are required to examine and determine is, whether the payments made by the plaintiff were voluntary; and a clear comprehension of the question cannot be had without setting out that portion of the testimony which relates to such payments.

The plaintiff testified that he had a contract with the government to furnish cattle for two months; that he went to Chicago and made a contract with the railroad company to ship cattle from that city to the city of Indianapolis, at the rate of sixty-five dollars per car load, and that he left an agent in Chicago to purchase and ship cattle, and that he returned to Indianapolis to receive such cattle. He then testified as follows:

"First shipped two car loads, which were delivered to me at my yards, under arrangements previously existing as to all stock shipped to me in the pork business, with Mr. Parmelee, agent of the L. & I. R. R., and one of the defendants; a day or two after this, the bill of freight, dated February 11th, 1865, for two hundred and one dollars and two cents, was presented to me by a drayman; I thought it too large, and told him I would see Mr. Parmelee; I called to see him, and told him my understanding of the arrangement, and that I would not pay it; he said it put him in an awkward place, as he had delivered the cattle to me, and his instructions were not to deliver until after freights were paid; I told him I was to receive other cattle; he said I must pay the bills for them, or he could not deliver cattle; I had him telegraph in relation to the bill; the answer was that there were other charges; Parmelee said he could give no items other than as appeared from the way-bill; he told me that he could not deliver cattle yet to be shipped to me, unless I paid the bills as they came in; he said he would have to unload the cattle in the railroad yards, unless I paid the bills. I had to have the cattle to fill a government contract, and I agreed to pay the bills for future shipments as they came

in, reserving the right of having errors or overcharges corrected; my contract with the government was to run for two months, and I had to have the cattle, and I agreed to pay the bills as presented for future shipments, reserving the right to have corrected errors and overcharges, and he agreed to send the cattle, as they came, direct to my yards."

Then follows a tabular statement of the sums which he had paid for freight on cattle, amounting in the aggregate to two thousand three hundred and sixty-five dollars and ninety cents.

The plaintiff then testified as follows: "The payments were made at different times; part, for cattle already received, was paid before all the cattle arrived; there had been but the one shipment before this arrangement; the first shipment had been delivered to me before the first bill was presented, and before the conversation above stated; part of the first shipment had been killed by me when this occurred, and part were still in my yards not killed. My recollection is that I paid the first bill at the date of our conversation at Parmelee's office; afterward I made payment as he sent in the bills; the February shipments were paid before March; the bills per car increased from about one hundred dollars to one hundred and forty dollars; I talked to Mr. Parmelee about this increase, but he could not account for it; he told me that he would make inquiries, and afterward told me that he could not find out much about it; said there were, might be, some charges for feed and hands for loading; he gave this as an explanation of the amount of the charges; I had no knowledge of any charges aside from freight, except what Parmelee told me; think he gave me one item of fourteen dollars, feed on one shipment, but aside from that, was not more specific than I have stated; I afterward talked to Parmelee about refunding; told him there was a great mistake, and I wanted it rectified; he said it was right that it should be rectified; that the bill was larger than they had ever collected before; I wrote to Lafayette and Chicago to

The Lafayette and Indianapolis Railroad Company *et al.* v. Pattison.

have it corrected, but they refused; they have never furnished me any statement of items, other than the bills."

The plaintiff, on cross examination, testified as follows:

"These bills now in court are the ones I paid. They may embrace loading, bedding cars; don't know now, nor did I prior to the payment of them, whether they embraced anything other than freight or not; Parmelee demanded payment of the bills as they are, and I paid them under protest; he made no other demand than is shown by bills; my son went up prior to February 25th; my son went up prior to that; think he came down with the cattle on the 23d of February; all the shipments were a good while on the road; I think I made out a statement of these overcharges and sent to Chicago; Parmelee told me he had no power to do anything in the matter."

Here follows a statement of contract in reference to the shipment of the cattle. The witness then proceeds as follows: "I did not pay the freight on any cattle before they were delivered to me; all freights I paid were on cattle that had already been delivered to me; no shipments paid until I had received the same; Parmelee told me, after the first shipment was received, he would deliver no cattle until freights were paid; I told him to send the cattle to my yard as they were brought in by the trains, and I would pay the bills, whatever they might be, reserving the right to have errors corrected; the next shipment was shortly after this agreement was made; after the conversation of Parmelee and myself, as shipments arrived the cars were sent to my yards and the cattle were delivered to me, and I paid the bills as presented, after the cattle had come to my possession."

Mr. Parmelee testified as follows: "In February and March, of 1865, I was local freight agent of the L. & I. R. R.; the cattle were received and delivered to Pattison; the freight bills were made up from the way-bills, and are as follows:" Here follow the way-bills. The witness then proceeded, as follows: "The charges advanced are not itemized in the way-bill, but in gross; there are, or may be, both

freight and other charges in the way-bills; I made out the receipted bills from the way-bills, but they are in the aggregate; Pattison inquired of me about the items; I told him I could not give the items; I told him I had no authority to collect other than according to the bills; when I made inquiry as to this first shipment, I was informed there were other charges aside from freight; Pattison claimed his contract was sixty-five dollars per car; the usual rate then was sixty dollars per car from here to Chicago; don't know the rate from Chicago here; after the first shipment came and had been delivered, I sent the bill around to Mr. Pattison for collection; he sent me word he would call and see me; he came, and claimed he had a contract for sixty-five dollars per car, and we agreed that for future shipments he would pay, under protest, whatever the charges might be, and I was to send the cars around to his yards, I telling him that if there were any overcharges they could be rectified as well after as before payment; the local rate per car from Lafayette here was twenty-five dollars; local rates are higher than through rates; on all of these way-bills, the one of date March 20th, contains an item of fourteen dollars for feed; Pattison and I had several conversations about this matter; he paid all of his bills under protest; he, on the first shipment, refused to pay, and then we agreed that I should send around the cars and he should pay the bills; my object was to get the freight, and his to get his cattle."

This witness, on cross examination, testified as follows:

"I did not, at any time, collect freight before the cattle, for transportation of which freight was charged, were delivered; cattle were all delivered first; I claimed payment of him just according to way-bill; I knew of no charges but as shown by the way-bill, and I know of no other now; all I know of items is what the way-bill shows; I know I showed Pattison the way-bill for the first shipment, and some others; I think I showed him all, but I am not positive that I showed him every one; on a rate of sixty-five dollars, M. & C. would get sixteen dollars and ninety cents,

The Lafayette and Indianapolis Railroad Company *et al. v. Pattison.*

L., N. A. twenty-eight dollars and sixty cents, and L. & I. nineteen dollars and fifty cents; distance from here to Lafayette, sixty-four miles; from Lafayette to Michigan City, ninety-two miles; from Michigan City to Chicago, fifty-six miles; on these way-bills no through rates are designated; when the amount due to the L. & I. road is specified on the way-bill, it indicates a contract; some of the cars are larger than others; when cars start from Chicago, charges made up from there, but they are re-way-billed at Michigan City and Lafayette, the proportion of each road being specified; if contract, at contract price; if no contract, then at the local rate of each road; when there is a contract, that is designated by the proportion each road is entitled to."

There was much testimony in reference to whether there was a special contract for shipping the cattle, and what was the usual rate of freight. The evidence above set out was all there was in reference to the delivery of the cattle to Pattison, and the payment by him of the freight.

It is earnestly claimed by the appellant that it is conclusively shown by the evidence that the payments made by the appellee were voluntary, and cannot be recovered back. On the other hand, it is maintained that the payments were compulsory, and can be recovered back.

The antagonistic position of counsel renders it necessary that we should determine what payments are voluntary and what are compulsory.

There is no conflict, in the authorities, upon the proposition that money voluntarily paid cannot be recovered back, and that money paid under compulsion may be recovered back; but there is considerable conflict among elementary writers and in the adjudged cases as to what are voluntary and what are compulsory payments.

It is settled that where a person is compelled, by duress of his person, to pay money, and he pays the same under protest, such payment is compulsory, and can be recovered back. By duress, in its more extended sense, is meant that degree of severity, either threatened or impending, or ac-

The Lafayette and Indianapolis Railroad Company *et al.* v. Pattison.

tually inflicted, which is sufficient to overcome the mind and will of a person of ordinary firmness. The common law has divided it into two classes, namely, duress *per minas*, and duress of imprisonment. Sec. 301, 2 Greenl. Ev.; *Fellows v. School District No. 8, in Fayette*, 39 Maine, 559; *Brooks v. Berryhill*, 20 Ind. 97; *Foshay v. Ferguson*, 5 Hill N. Y. 154; *Ex parte William Wells*, 18 How. U. S. 307; *Inhabitants of Whitefield v. Longfellow*, 13 Maine, 146; 2 Lord Coke's Institutes, 483; Co. Lit. 253; Vin. Abr. tit. Duress, (B.) pl. 23; Com. Dig. Pleader, (2 W. 20); Bac. Abr. tit. Duress (A); Chitty Contracts, 168; *Eddy v. Herrin*, 17 Maine, 338.

The weight of modern authority is, that a deed may be avoided which was obtained by duress, although the imprisonment was under legal process. In *Watkins v. Baird*, 6 Mass. 506, PARSONS, C. J., said: "It is a sound and correct principle of law, when a man shall falsely, maliciously, and without probable cause, sue out a process in form regular and legal, to arrest and imprison another, and shall obtain a deed from a party thus arrested to procure his deliverance, such deed may be avoided by duress of imprisonment. For such imprisonment is tortious and unlawful as to the party procuring it; and he is answerable in damages for the tort, in an action for a false and malicious prosecution; the suing of legal process being an abuse of the law, and a proceeding to cover the fraud."

Another class of cases is, where the payment of money is made upon an illegal demand by one who has authority to levy upon the property of the person upon whom such demand is made, and by a sale of such property to satisfy and discharge such claim; and where payment is made upon such a demand and to prevent such seizure and sale of property, the payment is also compulsory. *Boston and Sandwich Glass Co. v. City of Boston*, 4 Metcalf, 181; *Amesbury Woollen and Cotton Manufacturing Co. v. The Inhabitants of Amesbury*, 17 Mass. 461; *Preston v. The City of Boston*, 12 Pick. 7.

It is well settled by the current and weight of authority

The Lafayette and Indianapolis Railroad Company *et al.* v. Pattison.

that where money is paid with a full knowledge of all the facts and circumstances upon which it is demanded, or with the means of such knowledge, it cannot be recovered back upon the ground that the party supposed he was bound in law to pay it, when, in truth, he was not. He shall not be permitted to allege his ignorance of the law; and it shall be considered a voluntary payment.

The law is stated with accuracy and fullness by DEWEY, J., in the case of *Boston, etc., Glass Co. v. City of Boston, supra*, where it is said: "The legal principle relied upon, on this point, is this: that if a party, with full knowledge of all the facts of the case, voluntarily pays money in satisfaction or discharge of a demand unjustly made on him, he cannot afterward allege such payment to have been made by compulsion, and recover back the money, even though he should protest, at the time of such payment, that he was not legally bound to pay the same. The reason of the rule, and its propriety, are quite obvious, when applied to a case of payment upon a mere demand of money, unaccompanied with any power or authority to enforce such demand except by a suit at law. In such case, if the party would resist an unjust demand he must do so at the threshold. The parties treat with each other on equal terms, and if litigation is intended by the party of whom the money is demanded, it should precede payment. If it were not so, the effect would be to leave the party who pays the money the privilege of selecting his own time and convenience for litigation; delaying it, as the case may be, until the evidence, which the other party would have relied upon to sustain his claim, may be lost by the lapse of time and the various casualties to which human affairs are exposed.

"The rule alluded to, when properly applied, is doubtless a salutary one, and is not to be departed from, but in cases resting upon a plain and obvious distinction from such as are ordinarily and familiarly known as embraced within it. But the rule has its exceptions; and cases are not unfrequent, in which the party paying money upon an illegal demand, and

The Lafayette and Indianapolis Railroad Company *et al.* v. Pattison.

knowing it to be such when making the payment, has been allowed to recover back the money. If there be a controlling necessity in the case, arising from the peculiar circumstances under which the money is demanded, the rule does not apply. Thus where money is extorted by duress of goods, assumpsit will lie for it, as was held in the early case of *Astley v. Reynolds*, 2 Stra. 916, where the defendant had in pawn plate of the plaintiff, which he refused to deliver without the payment of the money illegally claimed; and it was held to be a payment by compulsion."

The case of *Astley v. Reynolds*, *supra*, being one of the earliest cases found in the books, and being the one upon which nearly all the subsequent cases are based, deserves a more careful examination than is given in the above case.

The facts of the case are as follows: "In an action for money had and received to the plaintiff's use, the case reserved for the consideration of the court was, that about three years ago, the plaintiff pawned plate to the defendant for twenty pounds, and at the three years' end came to redeem it, and the defendant insisted to have ten pounds for the interest of it, and the plaintiff tendered him four pounds, knowing four pounds to be more than legal interest. That the defendant refusing to take it, they parted; and at some months' distance the plaintiff came and made a second tender of the four pounds, but the defendant still insisting upon ten pounds, the plaintiff paid it, and had his goods: and now brings this action for the surplus beyond legal interest."

The court say: "The cases of payment by mistake or deceit, are not to be disputed; but this case is neither, for the plaintiff knew what he did, and in that lies the strength of the objection; but we do not think the tender of the four pounds will hurt him, for a man may tender too much, though a tender of too little is bad; and where a man does not know exactly what is due, he must at his peril take care to tender enough. We think also, that this is a payment by compulsion; the plaintiff must have such an immediate want of his goods, that an action of trover would

The Lafayette and Indianapolis Railroad Company *et al.* v. Pattison.

not do his business; where the rule *volenti non fit injuria* is applied, it must be where the party had his freedom of exercising his will, which this man had not. We must take it he paid the money relying on his legal remedy to get it back again."

In *Shaw v. Woodcock*, 7 B. & C. 73, reported in 14 Eng. Com. Law Rep. 18, BAYLEY, J., says: "If a party has in his possession goods or other property belonging to another, and refuses to deliver such property to that other, unless the latter pays him a sum of money which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment made by compulsion and may be recovered back."

HOLROYD, J., in the same case, said: "Upon the question whether a payment be voluntary or not, the law is quite clear. If a party making the payment is obliged to pay, in order to obtain possession of things to which he is entitled, the money so paid is not a voluntary, but a compulsory payment, and may be recovered back; and if the plaintiff below, therefore, was compelled to make the payment in question in order to get the policies of insurance, whether there was a pressing necessity or not, he has a right to recover it back."

In *Moses v. Macferlan*, 2 Bur. 1005, Lord MANSFIELD, after laying down the cases in which an action for money had and received will not lie, says: "But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express, or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances."

In *Stevenson v. Mortimer*, Cowper, 805, the plaintiff recovered, in an action for money had and received, an excess of fees by him paid to a custom-house officer, to obtain a document he was under the necessity of preserving.

In *Ripley v. Gelston*, 9 Johns. 201, the plaintiff recovered, in *assumpsit*, of the collector of New York, money illegally

The Lafayette and Indianapolis Railroad Company *et al.* v. Pattison.

claimed by him as tonnage and light money, and which the plaintiff paid to obtain a clearance of his vessel.

In *Clinton v. Strong*, 9 Johns. 370, money was reclaimed which had been wrongfully exacted by the clerk of the district court for the redelivery of property which had been seized.

In *Chase v. Dwinial*, 7 Greenl. 134, the court held, that where money has been paid under such duress or necessity as may give it the character of a payment by compulsion, such as money paid to liberate a raft of lumber detained in order to exact an illegal toll, it may be recovered back.

The court, after laying down the rule in cases of voluntary payments, says: "But this rule applies where the party has a freedom in the exercise of his will, and is under no such duress or necessity as may give his payments the character of having been made upon compulsion. It has been laid down as a general principle, that an action for money had and received lies for money got through imposition, extortion, or oppression, or an undue advantage taken of the party's situation."

The case of *Maxwell v. Griswold*, 10 How. U. S. 242, was an action to recover back money paid to the collector of the city of New York, which was alleged to have been illegally demanded and collected. The court found that the collector had demanded and received more money than was due, and that the same had been paid under protest. It was claimed on behalf of the collector, that the money had been voluntarily paid, and could not be recovered back. Upon that point the court say: "But the gist of the point is, were these increased duties in truth paid voluntarily, in the meaning of that term as applicable to the present subject? We have already seen, that the importer did not at first propose to enter his goods of such a value as to justify these increased duties. On the contrary, he insisted on entering them at only the price for which he purchased them, with charges, and thus agreeing with his original invoice, while the collector virtually insisted on having them appraised at

The Lafayette and Indianapolis Railroad Company *et al.* v. Pattison.

their increased value as at the time of the shipment, such being the usage in the custom-house at New York, and such the requirement of the circular of the secretary of the treasury, November 24th, 1846. The importer, knowing that this would subject him to a severe penalty, in order to avoid it, felt compelled to add to his invoice the amount which the price had risen between the purchase and the shipment.

"But this addition and consequent payment of the higher duties were so far from voluntary in him, that he accompanied them with remonstrances against being thus coerced to do the act in order to escape a greater evil, and accompanied the payment with a protest against the legality of the course pursued toward him.

"Now, it can hardly be meant in this class of cases, that to make a payment involuntary, it should be by actual violence or any physical duress. It suffices, if the payment is caused on the one part by an illegal demand, and made on the other part reluctantly and in consequence of that illegality, and without being able to regain possession of his property except by submitting to the payment.

"He was unwilling to pay either the excess of duties or the penalty, and must be considered, therefore, as forced into one or the other by the collector, *colore officii*, through the invalid and illegal course pursued in having the appraisal made of the value at the wrong period, however well meant may have been the views of the collector.

"The money was thus obtained by a moral duress, not justified by law, and which was not submitted to by the importer, except to regain possession of his property withheld from him on grounds manifestly wrong."

The following authorities were referred to in the above case: *Clinton v. Strong*, 9 Johns. 370; *Ashmole v. Wainwright*, 2 A. & E. N. S. 837; *Irving v. Wilson*, 4 T. R. 485; Cowper, 69, 805.

But it is maintained by counsel for appellants that the appellee should have refused to pay the freight demanded, and should have replevied his property. The appellee had the

right to replevy his cattle before payment, but having paid the money demanded, he now has the right to recover the sum back, if it was not voluntarily paid.

In the case of *Chase v. Dwinal supra*, the court say: "The party injured often finds a convenience in being allowed to select one of several concurrent remedies. In the case under consideration, replevin would have restored the property unlawfully seized. But to procure a writ, and an officer to serve it, would have occasioned delay, which might have subjected the plaintiff to greater loss than the payment of the money demanded. Besides, he must have given a bond to the officer to prosecute his suit; and he might meet with difficulty in obtaining sufficient sureties. Had he brought trespass, several months might have elapsed before he could have obtained a final decision, and this delay might have been attended with serious inconvenience. By the course pursued, these difficulties were avoided. Nor is the defendant placed by it in any worse situation."

The foregoing authorities very fully establish the propositions, that the doctrine of duress applies to property as well as to the person, and that where one person is in possession of the goods or property of another, and refuses to deliver the same up to that other, unless the latter pays him a sum of money which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment by compulsion, and may be recovered back.

But the above propositions of law are not decisive of the case under consideration, for the reason that the appellants were not in the actual possession of the appellee's cattle at the several times when the money was paid.

The evidence discloses the following facts: The appellee had, while the recent rebellion was in existence, a contract to furnish the government with a certain number of beef-cattle, which contract extended for only two months. The appellee, for the purpose of filling such contract, went to the city of Chicago, where, as he alleges, and as the jury

The Lafayette and Indianapolis Railroad Company *et al.* v. Pattison.

found, he made a contract with the appellants to ship cattle from such city to the city of Indianapolis, at the rate of sixty-five dollars per car load. Having secured transportation for his cattle, he left an agent in Chicago to purchase and ship them, and he returned to the city of Indianapolis to receive the cattle and complete his contract with the government. The first shipment consisted of two car loads. When the cattle arrived, they were sent by the local agent of appellants to the cattle yards of the appellee. Some days after the cattle had been received, Parmelee sent to the appellee a bill for the transportation of such cattle, amounting to the sum of two hundred and one dollars and two cents. The appellee refused to pay such bill, but went to see Parmelee, and informed him that he had a contract for the shipment of such cattle at sixty-five dollars per car load. Parmelee said he had no knowledge of such a contract; that he made out the bills from the way-bills, and that such bills must be paid as he made them out. The appellee then informed such agent that he was expecting other shipments of cattle under such contract, whereupon the agent declared that he would not deliver any other cattle until the freight was paid as he made it up from the way-bills. Such agent also informed appellee that there were some other items in the first bill other than freight, but he could not give the items or the amount thereof. The appellee insisted upon his contract; the agent insisted upon the payment of the bills for freight as he should make them out from the way-bills, and refused to deliver any other cattle without payment. The appellee remonstrated against being compelled to pay what he considered to be unjust. It was then agreed that the agent of the appellants was, upon the arrival of the other cattle, to send them to the cattle yards of the appellee, and was to make out the bills and send them to the appellee, who agreed to pay the first and all subsequent bills under protest, reserving the right to recover back from the appellants all money which he should pay in excess of the legal freight. In pursuance of such agreement, the agent of

The Lafayette and Indianapolis Railroad Company *et al. v. Pattison.*

appellants delivered the cattle as they arrived at the cattle yards of the appellee, who, after the cattle had been so delivered, paid the bills for freight, as made out and presented by such agent.

The question presented for our decision is, whether money paid, under the above state of facts, in excess of the proper and legal freight, can be recovered back.

In our judgment, the money so paid can be recovered back upon two grounds. In the first place, it was agreed and understood between the parties that the payment should not be regarded as a voluntary payment, and that the appellee should have the right to sue for and recover any money in excess of the just and legal freight; and the appellee having been thus induced to pay an unjust and illegal demand, the appellants ought to be and are estopped from alleging that the money was voluntarily paid.

In the second place, we are of opinion that the money so paid could be recovered back if there had been no valid agreement that it might be. While the appellants were not in the actual possession of the cattle of the appellee, they possessed such power and control over the shipment and delivery thereof as gave them an undue advantage over the appellee, and the necessity of the appellee was so great and pressing as to deprive him of the freedom of his will. The unjust and wrongful demand of the appellants, and the necessities of the appellee, coerced him to make the payments, but he made them under protest, and accompanied them with remonstrances against the injustice of the demand made upon him. In the case of *Maxwell v. Griswold, supra*, the importer submitted to the unjust and illegal demand made upon him by the collector, to avoid a greater evil, and the court held that he acted under moral duress, and that he could recover back the money which the law thus coerced and extorted from him. The parties did not stand upon equal terms. The appellee had to perform his contract with the government, or sustain not only loss of profit, but subject himself to damages. The contract being

The Lafayette and Indianapolis Railroad Company *et al.* v. Pattison.

limited to two months, he had no time to purchase other cattle, or procure shipment by a different route. The appellants refused, in advance, to deliver any future shipments, unless the bills of freight were paid as made out from the way-bills. There were six shipments of cattle, and if the appellee had resorted to the action of replevin, he would have been compelled to have brought six separate suits. To require this would have been unreasonable and oppressive. It is well settled, by an unbroken current of authorities in England and in this country, that money can be recovered back which has been procured through imposition, extortion, or oppression, or where an undue and unconscionable advantage has been taken of the situation or great and pressing necessity of a person, who, by means thereof, has been coerced into the payment, which gives such payment the character of a compulsory payment.

It is next insisted by the appellants that the court erred in giving to the jury the first, second, and fourth instructions asked by the plaintiff. We have carefully considered such instructions. In our opinion, it is not necessary to set them out in this opinion, or review them, as they involve the same questions of law that we have so fully considered already. If the instructions complained of stood alone, they might have possibly mislead the jury, but when taken in connection with the very full and accurate instructions given by the court of its own motion, we think they did not do the appellants any harm. The instructions, when considered together, were as favorable to the appellants as they had a right to ask.

It is next claimed that the court erred in suppressing some portions of the depositions of Homer E. Sargent and Thos. Hoops. We do not think so. The portions suppressed were wholly immaterial and irrelevant to the present case. They related to certain shipments made from Chicago to New Albany. A detailed statement is made of the number of cars loaned by The Michigan Central Railroad Company to The Louisville, New Albany, and Chicago Railroad Com-

The Ohio and Mississippi Railway Company v. Cole.

pany, the number of cars that were south of Michigan City at the time, and the expense and trouble to which the former company was put to secure a return of such cars. We are unable to see how such evidence could have had any bearing upon the case under consideration.

It is finally maintained that the damages assessed are excessive, and that the verdict is not supported by sufficient evidence. We have read the entire evidence, and entertain no doubt that the verdict was right.

The judgment is affirmed, with costs.

OSBORN, J., was absent, and took no part in the decision of this case.

J. S. Tarkington, J. E. McDonald, A. L. Roache, and E. M. McDonald, for appellants.

W. Morrow and N. Trusler, for appellee.

THE OHIO AND MISSISSIPPI RAILWAY COMPANY v. COLE.

RAILROAD.—Injury to Animals.—To render a railroad company liable, under the statute, for animals killed or injured by its cars, locomotives, or other carriages, there must be actual collision of the cars, locomotives, or other carriages with such animals.

SAME.—A railroad company is not liable, under the statute, for an injury to an animal, where a train caused the animal to take fright, and the injury was the result of the fright. Thus, the company is not liable, where a colt, frightened by a train, ran from an adjoining field upon the railroad track, which was not properly fenced, and there broke its leg between the bars of a cow-pit.

APPEAL from the Clark Circuit Court.

OSBORN, J.—This action was instituted before a justice of the peace to recover the value of a colt, which, it was alleged in the complaint, was wounded, run against, and killed by the locomotive and cars of the appellant, upon its track, at a place where the road was not properly fenced. After a

The Ohio and Mississippi Railway Company v. Cole.

trial before the justice of the peace, the cause was taken by appeal to the circuit court. There was a trial by the court, finding for the appellee for the amount claimed, motion for a new trial overruled, exception, and judgment on the finding.

The evidence is all set out in a bill of exceptions, and we think it does not sustain the finding of the court.

No witness testified that the colt was killed or injured by the cars or locomotive of the appellant. Nor does the evidence tend to establish it. On the contrary, we think it is shown by the evidence that the colt ran upon the track and broke its legs in a cow-pit, and that the section hands of appellant then killed it. Carr testified that Adams, the section boss, told him that the colt got its legs broken by the cars; but on cross examination, he was not certain that Adams said the cars hurt the colt, but he told him that the cars hurt it, or that it got hurt on the railroad. Blades, another witness for the appellee, testified that it had tried to jump a cow-pit on the appellant's railroad, and he heard Adams say that it had its leg broken on the railroad. The plaintiff testified that the section boss told him that the colt had come up from the gap, and its leg was broken. All of his witnesses testified that the section boss said that he had the colt killed. Heutza-meer, one of the appellant's witnesses, testified that the colt was in a field south of the cow-pit; that it became frightened by the cars and ran upon the track, and attempted to jump the cow-pit, and broke its leg between the bars across the pit.

In the case of *The Peru and Indianapolis Railroad Co. v. Hasket*, 10 Ind. 409, this court held, and we now hold, that to render a railroad company liable for animals killed or injured by the cars or locomotive, or other carriages of the company, under the statute, it must be proven that there was an actual collision between the locomotive, cars, or other carriages of the company, with the animal injured. It is not enough to prove that the train caused the animal to take fright, and the injury was the result of the fright.

Castle v. House.

The evidence in the record before us does not show that the colt was touched by the locomotive, cars, or other carriages of the appellant. The finding of the court was not sustained by the evidence, and a new trial ought to have been granted.

The judgment of the said Clark Circuit Court is reversed, with costs, with instructions to said court to grant a new trial, and for further proceedings, etc.

G. V. Howk, W. W. Tuley, and C. P. Ferguson, for appellant.

CASTLE v. HOUSE.

COSTS.—*Justice of the Peace.—Judgment.—Appeal.*—Section 398, 2 G. & H. 227, providing, that in all actions for damages solely, not arising out of contract, if the plaintiff does not recover five dollars, he shall recover no more costs than damages, does not apply to cases appealed from a justice of the peace; but in such cases costs follow judgment under, and with the exceptions found in, section 70, 2 G. & H. 597.

SAME.—If, in an action of trespass *quare clausum fregit*, before a justice of the peace, a judgment is recovered by the defendant, from which the plaintiff appeals to the circuit court, and there recovers a judgment for less than five dollars, the general rule prevails, that costs follow the judgment, and he also recovers costs.

APPEAL from the Warrick Circuit Court.

DOWNNEY, J.—The appellant sued the appellee before a justice for trespass *quare clausum fregit*, and was beaten. He appealed to the circuit court, where he recovered judgment for two dollars damages. The court, referring to section 398, 2 G. & H. 227, allowed him to recover no more costs than damages. That section provides, that, "in all actions for damages solely, not arising out of contract, if the plaintiff do not recover five dollars damages, he shall recover no more costs than damages, except in actions for injury to

Castle v. House.

character and false imprisonment, and where the title to real estate comes in question."

Counsel for appellant contend that the case is not governed by this section, but by section 70 of the justices' act, 2 G. & H. 597. This section provides, that "costs shall follow judgment in the court of common pleas, or circuit court on appeals, with the following exceptions: First. If either party, against whom judgment has been rendered, appeal and reduce the judgment against him five dollars or more, he shall recover his costs in the court of common pleas or circuit court, when the appellant appeared before the justice. Second. If either party, in whose favor judgment has been rendered, appeal and do not recover at least five dollars more than he recovered before the justice, the appellee shall recover his costs in the court of common pleas or circuit court."

We think section 398 was intended, and should be held, to apply to cases commenced in the common pleas or circuit court, and not to cases appealed to these courts from a justice of the peace. The object was, no doubt, to prevent or discourage the commencement of suits for trifling wrongs in those courts. Entertaining this view, it would seem to follow that in actions for such wrongs, before a justice of the peace, or on appeal to the common pleas or circuit court, the general rule prevails, that the costs follow the judgment, with the exceptions found in section 70. Such we understand to be the ruling of this court in *Brown v. Snively*, 24 Ind. 270.

The judgment relating to the costs is reversed, with costs, and the cause remanded, with directions to render judgment for full costs against the defendant below.

J. S. Moore, and C. S. Denny, for appellant.

W. J. Keith, for appellee.

Goodwine *et al.* v. Crane, Trustee.

GOODWINE ET AL. v. CRANE, TRUSTEE.

PRACTICE.—*Bill of Exceptions.—Evidence.*—A paper purporting to be a bill of exceptions consisted of a certified agreement, signed by counsel of both parties and the judge of the court below, that "the following was all the evidence that was offered in said cause by both parties, together with all the exhibits, plats, maps, etc., and is submitted to this court by the agreement of the parties as all the evidence," to which, after the signatures of counsel and the judge, were attached various documents and what purported to be the evidence of witnesses.

Held, that the evidence was not in the record.

SAME.—The Supreme Court cannot decide whether the finding of the court below is or is not sustained by the evidence, where the evidence is not in the record by bill of exceptions.

SAME.—*Judgment.*—The assignment, as a reason for a new trial, that the judgment of the court is not sustained by the law and is contrary to law, presents no question for the decision of the Supreme Court.

SAME.—Under the code, a written instrument, or any documentary evidence, need not be copied into a bill of exceptions, but may be referred to, if its appropriate place be designated by the words "here insert;" but testimony given in the cause must be set out in the bill of exceptions.

SAME.—The statement in a bill of exceptions, that "the following was all the evidence offered" does not show how much evidence was admitted.

RECORD.—It is improper to make up a record for the Supreme Court in the form of a continuous roll.

APPEAL from the Tippecanoe Circuit Court.

DOWNNEY, J.—This was an action by the appellee against the appellants, to recover possession of fractional sections three, ten, fifteen, twenty-two, twenty-seven, and thirty-four, in township twenty-two, north of range ten west, in Warren county, Indiana, containing in all two hundred and twenty-seven acres and thirty-eight hundredths, of which it was alleged the defendants held possession without right, etc. There was another paragraph of the complaint, which sought to quiet the title of the plaintiff to the same lands.

The defendants pleaded the general denial, and also a second paragraph, which was, on motion of the plaintiff, stricken out. The issue was tried by the court, and there was a finding for the plaintiff. A motion by the defendant for a new trial was overruled, and judgment rendered on the finding.

The only error properly assigned is the overruling of the

41	335
130	425
41	335
149	148
41	335
158	480

Goodwine *et al.* v. Crane, Trustee.

motion for a new trial. The reasons assigned in the written motion why a new trial should be granted are, first, that the finding of the court is not sustained by the evidence, and is contrary to the evidence; second, that the judgment of the court is not sustained by the law, and is contrary to the law.

The evidence is not in the record, and for this reason we cannot decide whether the court improperly refused to grant a new trial for the first reason stated, or not. We do not know what is intended by the second reason. There is in the record what purports to be a special finding by the court; but it was not signed by the judge, nor incorporated in any bill of exceptions in the record—*Roberts v. Smith*, 34 Ind. 550—and there were no conclusions of law excepted to by either party. The second reason for a new trial does not, according to any law, or any practice sustained by this court, present any question for decision. *The Board of Commissioners of Lagrange Co. v. Newman*, 35 Ind. 10; *Leffel v. Leffel*, 35 Ind. 76; *The Ohio, etc., R. R. Co. v. Hays*, 35 Ind. 173. There is nothing for us to decide.

The judgment is affirmed, with costs.

ON PETITION FOR A REHEARING.

DOWNEY, J.—In the opinion in this case it is stated that the evidence is not in the record. In a petition for a rehearing, counsel for the appellants insist that the court is mistaken in this. To settle the question, we copy the bill of exceptions as it appears in the record:

“William Crane et al. v. Abner Goodwine et al. In Tippecanoe Circuit Court, April Term. Be it remembered, that on the trial of the above-entitled cause, the following was all the evidence that was offered in said cause, by both parties, together with all the exhibits, plats, maps, etc., and is submitted to this court by the agreement of the parties, as all the evidence.

“Gregory & Harper, Att’y’s for Defendants.

“Hughes & Stein, Att’y’s for Plaintiff.

“DAVID P. VINTON.”

To this are attached the various documents, which, we presume, had been given in evidence in the circuit court, put up in a roll of very inconvenient length; and also what purports to be the testimony of witnesses in the cause. Prior to the adoption of the code, every document given in evidence must have been set out in the bill of exceptions. *Doe v. Makepeace*, 8 Blackf. 575; *Spears v. Clark*, 6 Blackf. 167; *Huff v. Gilbert*, 4 Blackf. 19. It is now provided by the code, that it shall not be necessary to copy a written instrument, or any documentary evidence, into a bill of exceptions; but it shall be sufficient to refer to such evidence, if its appropriate place be designated by the words "here insert." 2 G. & H. 209, sec. 343. There is no statutory relaxation of the former rule with reference to the testimony given in the cause. *Stewart v. Rankin*, 39 Ind. 161.

It scarcely appears, from the bill of exceptions, that any evidence was given on the trial. The bill of exceptions says, "The following was all the evidence offered." How much of it was admitted is not shown.

The transcript is not prepared, nor perhaps capable of being prepared, according to rule nineteen of this court, which requires the pages and lines to be numbered, and marginal references made, denoting the different parts of the record. The clerk of this court is provided with the proper means and places for filing and preserving the records which come to this court in proper form, but this one is, in form, wholly unsuited and unfit for such files. Every consideration entering into the question forbids that we should allow or encourage any such practice as that resorted to in this case. But we do not desire further to criticise the record, and should not have said what we have, had counsel been content with our first opinion.

The petition for a rehearing is overruled.

B. F. Gregory and *J. Harper*, for appellants.

J. A. Stein and *E. Hughes*, for appellee.

Gaskill v. Aldrich.

GASKILL v. ALDRICH.

EXECUTION.—Form.—A paper issued by a justice of the peace to a constable, reciting the rendition of a judgment, as appears of record on his docket, and adding the words "by levy and sale of the goods" of defendant, "and make return thereof within six months from date," without other words of command or direction, will not justify a levy by the constable.

SAME.—Sale.—Constable.—Personal property must be present and subject to the view of those attending a constable's sale. And the sale, in good faith, by a constable, of a hog, in a pen from one to two hundred rods from the place of sale, and entirely out of sight, is unauthorized.

APPEAL from the DeKalb Circuit Court.

OSBORN, J.—The questions in this case are, first, whether a paper, issued by a justice of the peace to a constable, merely reciting the rendition of a judgment, as appears of record on his docket, with the addition of the words "by levy and sale of the goods" of the judgment defendant, "and make return thereof within six months from date," without any other words of command or direction to the constable, will justify him in levying upon and taking the goods of the judgment defendant. We answer that it will not. 2 G. & H. 601, sec. 77; same, p. 612, form No. 4.

Second. Whether a constable can sell goods taken on execution, unless the same are present and subject to the view of those attending the sale. We hold that he cannot. 2 G. & H. 250, sec. 469. The language of the statute is as follows: "Personal property shall not be sold unless the same shall be present and subject to the view of those attending the sale." Property over one hundred rods from, and not in sight of, the place of sale, and not exhibited for sale by the constable, is not present and subject to view, as required by the statute.

We do not mean to hold that if the property had been present and subject to view, or if the constable had taken the persons present to the property and shown it to them, and the circumstances or condition of the property were such that it was not possible or prudent to have it all directly before and in sight of them at the moment of sale, it

would be unauthorized. We do hold, however, that the sale of a hog in a pen from one to two hundred rods from, and entirely out of sight of, the place of sale, as was done in this case, was not authorized. And the fact that the constable, in making the sale, did it honestly, and without any purpose of committing a fraud, will not aid the sale.

The judgment of the said DeKalb Circuit Court is reversed, and the cause remanded, with directions to grant a new trial, and for further proceedings in accordance with this opinion.

J. H. Baker and *J. A. S. Mitchell*, for appellant.

BROOKBANK ET UX. v. KENNARD ET AL.

HUSBAND AND WIFE.—*Alienation of Real Estate.*—*Fraudulent Conveyance.*—

A conveyance of real estate may be made by a husband to his wife without the intervention of trustees, and such conveyance will be upheld unless the rights of creditors are injuriously affected thereby.

SAME.—A husband may convey to his wife a reasonable amount of property, leaving ample in his hands for the payment of his debts, and such conveyance will be valid, at least as against future creditors.

SAME.—*Recording Deed.*—That a conveyance, executed by a husband directly to his wife, has not been recorded for a year, and until after the contraction of debts by the husband, cannot, of itself, render it void.

PLEADING.—The statement, in a pleading, of the amount of an indebtedness as "a large sum of money" is too vague and indefinite.

APPEAL from the Carroll Circuit Court.

WORDEN, J.—The appellees, who were judgment creditors of John Brookbank, filed their complaint against him and his wife to set aside a conveyance made by Brookbank to his wife of certain real estate described, and to subject the property to the payment of the plaintiffs' judgments. On the failure of Brookbank and wife to answer, judgment was rendered against them as prayed for.

41	339
136	148
41	339
144	14

Brookbank et ux. v. Kennard et al.

Error is assigned that the complaint does not state facts sufficient to constitute a cause of action.

The allegations of the complaint, in respect to the property in question, are as follows:

"That on the 26th day of December, 1839, the said defendant became owner, by deed in fee simple, of the following described premises, to wit" (here the property is described, being a part of a town lot); "and that on the 9th day of October, 1865, the said defendant John Brookbank executed a warranty deed for said property, without any valuable consideration, to Louisa Brookbank, wife of said defendant, which said deed was not placed on record for more than one year thereafter, to wit, on the 26th of November, 1866; that on said 9th day of October the said defendant was owing a large sum of money, which still remains due and unpaid; and that the said indebtedness of the said defendant to said plaintiffs, upon which said judgments were rendered as aforesaid, accrued previous to the said 26th day of November, 1866, when said conveyance was recorded as aforesaid."

A conveyance of real estate may be made directly by a husband to his wife without the intervention of trustees, and such conveyance will be upheld unless the rights of creditors are injuriously affected thereby. *Sims v. Rickets*, 35 Ind. 181; *Thompson v. Mills*, 39 Ind. 528.

In this case, no fraud is imputed to the appellants by direct averment, nor do we think any can be inferred from the facts stated. It is averred that at the time of the conveyance by Brookbank to his wife, he "was owing a large sum of money, which still remains due and unpaid." The amount of his indebtedness, expressed by the phrase "a large sum," is too vague and indefinite to have much force in a judicial proceeding. The indebtedness may have been one dollar or a hundred thousand.

Then it does not appear but that, at the time of the conveyance by Brookbank to his wife, he had an abundance of other property to pay all of his debts. There is no aver-

ment whatever on this subject. We take it to be clear that a husband may convey to his wife a reasonable amount of his property, leaving ample in his hands for the payment of his debts, and that such conveyance will be valid at least as against future creditors. Tyler Infancy & Coverture, sections 357 to 361, inclusive.

The plaintiffs' debts were not contracted until after the conveyance from Brookbank to his wife, and for aught that appears, the conveyance was valid as to them, unless the fact that it was left unrecorded until after their debts were contracted makes it fraudulent as to them. It is not alleged in the complaint that the plaintiffs' debts were contracted without notice of the conveyance, and on the faith that Brookbank was still the owner of the property, even if such circumstances would render the conveyance fraudulent as to them. We are of opinion that the simple fact that the conveyance was not recorded until after the contraction of the debts, cannot alone have the effect of rendering it void as to the plaintiffs.

The allegations of the complaint are not sufficient to entitle the plaintiffs to have the conveyance set aside.

The judgment below is reversed, with costs, and the cause remanded.

J. H. Gould and *B. B. Daily*, for appellants.

J. Applegate, for appellees.

KLINGENSMITH v. KEPLER.

41	341
137	77

ATTORNEY.—*Suspension of.*—The provisions of the statute for the suspension of an attorney from practice are penal in their nature, and should be strictly construed.

SAME.—*Partnership.*—An attorney cannot be suspended from the practice by the default of his partner in collecting and converting the money of a client without his knowledge or consent.

Klingensmith v. Kepler.

SAME.—*Appeal.*—*Notice of.*—Where a judgment was rendered for money, and also suspending two partners, attorneys, from practice, one appealed from the judgment of suspension.

Held, that the judgment of suspension was personal only to the appellant, and section 551 of the code (2 G. & H. 270), requiring notice of appeal to be served on co-parties, did not apply.

APPEAL from the Marion Common Pleas.

DOWNNEY, J.—This action was brought by the appellee against the appellant and one William V. Burns, who were partners in the practice of law, to recover certain moneys which they had collected for him; and in the prayer of the complaint it was asked that they should be suspended from the practice. The complaint was verified by the oath of the plaintiff.

Burns made default. Klingensmith answered, first, a general denial; second, he admits the partnership of the defendants, as alleged; the recovery of a judgment in favor of the plaintiff for the money in question; the payment of the money thereon into the hands of the clerk; and alleges the receipt of the said money by Burns, without the knowledge or consent of Klingensmith, and that he feloniously appropriated the same to his own use, against the will of Klingensmith; that the plaintiff, although immediately informed thereof, declined and refused to prosecute Burns therefor, and suffered and allowed him to squander the same. He admits that he is liable for the money, and offers to confess judgment therefor, with costs; but claims that he is not liable to be suspended from the practice; third, he says that all of said acts were done and performed by Burns alone, contrary to his wish and without his knowledge; that Burns, without his fault or knowledge, received the money and feloniously appropriated the same to his own individual use, of which the plaintiff at the time had full knowledge; wherefore, etc.

The plaintiff, after unsuccessfully demurring to the second and third paragraphs of the answer of Klingensmith, replied thereto by a general denial.

The issues were tried by a jury, and the jury found, in

Klingensmith v. Kepler.

answer to interrogatories, that the defendants received from the clerk, for the plaintiff, the sum of five hundred and seventy-eight dollars and fifty-eight cents, on the 7th day of July, 1868; that the defendants were practising attorneys and partners; that they had never paid the money, or any part of it, to the plaintiff; that the plaintiff had repeatedly demanded the money of the defendants before suit brought; and that the defendants had dissolved their partnership after the receipt by them of said money. They also found that Burns received the money and appropriated the same to his own use, without the knowledge or consent of Klingensmith; and that Klingensmith did not receive or appropriate to his use any of said money, or consent to its appropriation by Burns.

The court, upon the findings of the jury, rendered judgment for the amount of money found due to the plaintiff, and ordered that both of the defendants be suspended from the practice.

Klingensmith moved for a new trial as to the part of the judgment suspending him from the practice; but his motion was overruled, and he excepted. He appealed from so much of the judgment as adjudges a suspension from the practice, and, by proper assignment of error, has presented the question as to the correctness of that ruling of the court.

The appellee has moved the court to dismiss the appeal, because it is taken by only one of the defendants to the judgment below. It is the opinion of a majority of the court that he alone may appeal from so much of the judgment as suspends him from the practice, that being personal to him, and distinguishable from the judgment for the money, and that section five hundred and fifty-one does not apply to the case.

The question is presented, whether, when two or more attorneys are practising in partnership, and one of them receives and improperly appropriates the money of a client, without the knowledge or consent of the others, and fails, on demand, to pay it over, the whole firm of attorneys can be

Struble *et ux.* v. Neighbert.

suspended from the practice. It is not denied but that they are all civilly liable to judgment and execution; but it is contended that those who are not personally culpable cannot be suspended from practice.

The provisions of the statute for the suspension of an attorney from the practice are penal in their nature, and may, therefore, properly receive a strict construction. We cannot think that it was the design of the legislature to authorize or require the suspension of an attorney for the default of his partner, of which he had no knowledge, in which he did not in any way participate, and to which he in no way consented.

So much of the judgment of the common pleas as suspends the appellant from the practice is reversed, with costs.

J. S. Harvey and *J. Hanna*, for appellant.

J. L. Mitchell and *W. A. Ketcham*, for appellee.

41	344
124	406
41	344
141	331

STRUBLE ET UX. v. NEIGHBERT.

PLEADING.—Mortgage.—Foreclosure.—Description.—The complaint for a foreclosure of a mortgage should so describe the premises that, if a sale is ordered, the officer may know on what to execute the order.

SAME.—The complaint for a foreclosure of a mortgage is fatally defective where, without containing a sufficient description of the premises mortgaged, it refers to the mortgage made a part thereof, which contains no sufficient description, but itself refers therefor to another instrument.

APPEAL from the Ripley Common Pleas.

OSBORN, J.—This was an action to foreclose a mortgage executed by the appellants to the appellee. There was a default and judgment of foreclosure.

The only question which we consider necessary to decide is as to the sufficiency of the description of the mortgaged property.

The complaint is in the usual form, stating the execution

Struble et ux. v. Neighbert.

of the notes and mortgage, and that copies are filed with it. It alleges that the appellants executed a mortgage conveying to the plaintiff the tract of land therein described. The only description of the land given is in the copy of the mortgage, which is as follows: "The following real estate situate in Ripley county, in the State of Indiana, to wit, a certain lot or parcel of land lying and being in sections seventeen (17) and eighteen (18), in town seven, north of range twelve east. For a more definite description of said tract of land see deed of conveyance from said Thomas M. Neighbert and wife to said Struble, dated March 31st, 1870, recorded in the recorder's office at Versailles, Ripley county, and State of Indiana, which is made a part of this mortgage."

The description fails to designate any particular piece of land. It does not even state the quantity. It lies in two sections, and that is all the description that is given.

In a complaint for a foreclosure, it should so describe the premises that if a sale is ordered the officer may know on what land to enter to execute the order of the court. *Whitely v. Beall*, 5 Blackf. 143; *Nolie v. Libbert*, 34 Ind. 163; *White v. Hyatt*, 40 Ind. 385.

The complaint was fatally defective for the want of a sufficient description. It would be impossible for any one to locate the land from it. With proper averments in the complaint, undoubtedly it can be made good.

The said judgment of the said court of common pleas of Ripley county is reversed, with costs, with instructions to permit the said appellee to amend his complaint, and not to render judgment of foreclosure thereon without amendment.

G. Durbin, for appellants.

Wallace, Adm'r, v. Metzker et al.

WALLACE, ADM'R, v. METZKER ET AL.

STATUTE OF LIMITATIONS.—*Fraud.—Conveyance Treated as Mortgage.*—Complaint against an administrator, alleging that a deed of conveyance of land to his decedent, absolute on its face, was a mortgage; that the decedent, as the attorney of the plaintiff, was guilty of gross fraud and violation of duty in procuring his client, the plaintiff, to execute a deed instead of a mortgage to secure liabilities incurred by the attorney in becoming bail for him, and for fees due the attorney; and that, to defraud the plaintiff, the decedent had conveyed the land to another; and asking that the estate of the decedent pay to the plaintiff the value of the land, less the amount due from the plaintiff to the decedent on account of such liabilities and fees. The administrator answered that the cause of action did not accrue within six years next before the commencement of the action, and, also, that more than eighteen months elapsed after the death of the decedent before the action was commenced.

Held, on demurrer to the answer, that whether the action was for relief against fraud, or to recover money, the answer was good.

APPEAL from the Marion Civil Circuit Court.

PETTIT, C. J.—This suit was brought by the appellees against the appellant, as administrator of Walpole, and one Henricks, to have a deed, absolute on its face, made to Walpole, decreed to be a mortgage; for an accounting as to what was due to the estate of Walpole, stating a readiness and willingness to pay the same; and for redemption. The complaint shows the lands to be worth ten thousand dollars. The appellee, Metzker, was indebted to Walpole by note, in five hundred dollars, given to him as a fee for defending Metzker on an indictment then pending; and Walpole also went Metzker's bail for his appearance to the indictment, and a mortgage was to have been made by Metzker and wife to Walpole, to secure the note and to secure him against loss by being such bail; that the note and interest is still due; that the indictment was never proved, Metzker discharged, and that Walpole never had anything to pay as such bail of Metzker.

The complaint charges gross fraud and violation of his duty as the attorney and confidential adviser of Metzker against Walpole, in procuring the appellees to make a deed instead of a mortgage in form; that, after the deed, which

was to stand as a mortgage, was made, Walpole, to defraud the appellees, conveyed the lands to defendant Henricks; and that he had full knowledge of all the fraud of Walpole. The complaint concludes thus: "They ask that an accounting be had, and the sum due the estate of Walpole be ascertained, which these plaintiffs are ready and willing to pay, and that the said conveyance from them to Walpole be decreed a mortgage, and subject to redemption, and that the said conveyance to Henricks be decreed voidable; or, if valid for any reason, then that said Walpole's estate pay the plaintiffs what the lands were worth, less the five hundred dollars and interest due said estate, and all other proper relief, including a judgment for ten thousand dollars." No objection was, or is, raised to the complaint. It is palpably good for the purposes sought to be accomplished. The defendants answered separately. The third paragraph of the answer of Wallace, as administrator of Walpole, was this:

"And the said defendant, for a further answer, says that the plaintiffs' cause of action herein sued on did not accrue within six years next before the commencement of this action, and that more than eighteen months elapsed after the death of said Walpole before said action was commenced."

There was a demurrer to this paragraph of the answer, for want of sufficient facts, sustained, and this ruling is assigned for error. There was a trial, verdict, and judgment for defendant Henricks, and against defendant Wallace, as administrator. Wallace appeals, and assigns for error the sustaining of the demurrer to his third paragraph of the answer. Whether this case is to be considered as an action for relief against fraud, or to recover money, in the event that the fraud is beyond reach, because the property had passed into the hands of an innocent purchaser, we must hold that the answer was good; and we hold that our statute of limitations, and the cases of *Pilcher v. Flinn*, 30 Ind. 202, and *Potter v. Smith*, 36 Ind. 231, fully warrant this ruling. The

Gadbury *et al.* v. Stahl, Executor.

judgment, for this error, must be reversed as to Wallace, administrator.

There are other questions attempted to be presented by a bill of exceptions, but as it is not properly in the record, we cannot pass upon them.

The judgment, as to Wallace, administrator, is reversed, at the costs of the appellee, with instructions to the court below to overrule the demurrer to the third paragraph of the answer of defendant Wallace, and for further proceedings.

J. S. Harvey and *W. March*, for appellant.

G. H. Voss, *B. F. Davis*, and *J. A. Holman*, for appellee.

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GADBURY ET AL. v. STAHL, EXECUTOR.

EXECUTOR.—*Sale of Real Estate.—Report of Sale.—Remote Damages.*—To a complaint by an executor upon a promissory note, the defendant answered, that he gave the note for the payment in part of the purchase-money of land bought from the plaintiff as executor, and that said purchase was made, as the plaintiff well knew, for the purpose of selling a portion of the same to a certain railroad company, to erect a depot thereon, but that the plaintiff neglected to report said sale to the court and have the same confirmed and a deed made at the April term of the common pleas court, and until the September term thereof, whereby the sale thereof to the railroad company was lost, and the enhanced value of said land which would have resulted from the erection of said depot was lost, to the damage of the defendant five hundred dollars, which sum he offered as a counter-claim. It was not alleged that the defendant did not know that the plaintiff would not report said sale; nor was it averred that the defendant moved the court to require such report, or that the plaintiff agreed to make such report at said term, or that the defendant had made a valid contract with the railroad company.

Held that the damages were too remote.

APPEAL from the Blackford Circuit Court.

PETTIT, C. J.—Appellee sued appellants, Gadbury, Beath, Ransom, and Saxon, on a note payable to him, as executor. The complaint is in the usual and proper form.

All the defendants answered by general denial. Defendant Gadbury alone filed a second and third paragraph of the answer. They are, in all legal respects, the same, and so admitted to be by appellants' brief; we need, therefore, only set out the second paragraph, which is as follows:

"The defendant Gadbury, for further answer to the complaint in this cause, says that he purchased the following described lands, to wit: the south-east quarter of section eleven, township twenty-three north, range ten east, except ninety-six rods in the same, in Blackford county, Indiana, of the plaintiff, and for which the note in suit was in part consideration executed; and defendant avers that, at the time the contract was entered into between the plaintiff and defendant for the purchase of said land, it was well known to plaintiff that defendant was purchasing said land with the expectation of procuring the location of the depot of The Ft. Wayne, Muncie, and Cincinnati Railroad on the lands; and defendant avers that he had such arrangement with said railway company, by which he was to transfer to said company lands for such depot at and for the sum of——; that said company would have located said depot on said grounds, if said defendant could have transferred the right to such grounds to said company. But defendant avers that he purchased said lands on the 22d day of February, 1870, and that a certificate was made of such sale to him by said plaintiff, on said day; and the defendant avers that it was the duty of said plaintiff to have procured said sale to be confirmed at the April term, 1870, of the common pleas court of said county; and defendant avers that said plaintiff failed and neglected to procure the confirmation until September term, 1870, of said court, and during all which time defendant was unable to make said company a title to said depot grounds, which he could and would have done if said sale had been confirmed, as it might and ought to have been done, if said plaintiff had caused a report to be made to such court. The defendant avers that, by reason of the failure of said plaintiff to cause said sale to be confirmed at said

Gadbury et al. v. Stahl, Executor.

April term of said court, as he might have done, the defendant was unable to make said company a title to such depot grounds, and said company located their said depot at another place. The defendant avers that the location of said depot on said lands would have enhanced the value of said lands and rendered it of greater value than the sum the defendant was to pay for the same. Wherefore defendant says that, by reason of said failure of plaintiff as aforesaid, defendant has suffered damages in the amount of five hundred dollars; which sum defendant will offer as a counterclaim against any sum which plaintiff may establish against said defendant in said cause."

Other paragraphs and rulings on them are spoken of, but they are not in the transcript, except that, by way of abundant caution, the general denial is twice pleaded.

To the second and third paragraphs of Gadbury's answer, there was a demurrer, for want of sufficient facts, sustained, exception taken, and this ruling is assigned for error. This paragraph is very loosely, not to say awkwardly, drawn, but if it were well drawn, we should hold that the damage is too remote and contingent to be recovered in this way. We waive the questions as to whether this is an attempt to answer the whole complaint, but only answers a part of it, and whether it should not have been by all the defendants; yet we must hold the answer bad, because it does not show that the plaintiff agreed to report the sale and have it confirmed at the April term, and because it does not show that Gadbury had made a valid and legally binding contract with the railroad company for the sale of the lands. Admitting that it was the duty of the executor to make a report of the sale to the common pleas court, at the first term after the sale was made, and he did not do it, yet the answer does not show but that Gadbury knew that the executor would not do his duty in this respect, or that he moved the court for a rule against the executor to do his duty, as he might undoubtedly have done.

It is assigned for error that the court did not carry back

the demurrer to the answer to the complaint. We have already declared this complaint good.

There was a trial by the court, and finding for the plaintiff below for the amount of the note and interest, motion for a new trial, for the reasons, first, in sustaining the demurrer to the answer; this is no cause for a new trial; second, for excessive assessment of damages. We have calculated the interest on the note, and instead of the damages being too large, they are in fact about eight dollars too small; third, the demurrer should have been sustained to the complaint. This is no reason for a new trial; besides, we have above twice ruled that the complaint was good. There was a motion in arrest of judgment, for the reasons, first, the court erred in sustaining the demurrers to the ——— paragraphs of the answer, and to the amended third paragraph of the defendant's answer. This is no reason or cause for arresting a judgment, but if it was, the above rulings dispose of it.

Second. The demurrers to the answer should have been sustained to the complaint. This has been disposed of above.

Third. The court erred in the assessment of damages, the same being too large. This is no reason for the arrest of the judgment; besides, it is false in fact and law, as we have seen above.

We are fully impressed that this appeal has no merits in it, and that it was brought here for delay merely, and not to correct any error of the court below, or to redress any legal grievance the appellants had suffered by its action.

The judgment is, in all things, affirmed, at the costs of the appellants, with five per cent. damages.

A. Steele, R. T. St. John, W. A. Bonham, C. H. Test, D. V. Burns, and G. S. Wright, for appellants.

J. Brownlee and H. Brownlee, for appellee.

Miller v. Long et al.

MILLER V. LONG ET AL.

PARTITION.—*Conveyance by Husband and Wife to Defraud Creditors.*—*Deed Set Aside.*—A complaint for partition alleged that the husband of the plaintiff died seized of the land in question, and that the plaintiff, as his widow, was the owner of one-third thereof, and her children, made defendants, of the other two-thirds; that before the death of her husband, he, with the plaintiff, conveyed the land to one M.; that after the death of the plaintiff's husband, the administrator of his estate procured an order of court setting aside the deed and directing the sale of two-thirds of said land to pay debts of said estate; that before the said decree setting aside said deed, the said M. reconveyed the land to the plaintiff; and she charged that the defendant L. claimed some interest in said land. The defendant L. answered, that the conveyance to M. was made to hinder and delay the creditors of the plaintiff's husband, and that the plaintiff knew the purpose and joined in the fraud; that she was made a party defendant to the suit to set aside the conveyance, and she answered therein denying any interest in said land, and asserting that it was the property of said M., and the court in said proceeding found and adjudged said deed to be fraudulent and void, and set it aside as to two-thirds of the land, and directed the same to be sold to pay the debts of the deceased, and adjudged costs against the plaintiff herein and said M., and under an execution issued thereon and levied upon the interest of M. in said land, the same was sold and was purchased by the defendant L.; that at said sale the said plaintiff represented to the public, and to this defendant, that she had no interest in said land, but that it was the property of the said M.; and that the deed from the said M. was void, never having been delivered to her. A demurrer to this answer was overruled.

The plaintiff replied, alleging that the defendant L. had full notice of the title of the plaintiff, and that before he purchased said land at the sale upon execution, under the said judgment for costs against M., the plaintiff in his presence made the proper demand on the sheriff to have the said one-third of said land set off to her, as the head of a family, under the law authorizing three hundred dollars to be thus set off. A demurrer was sustained to this reply, and the trial resulted in a finding for the defendant L.

Held, that admitting the complaint to be sufficient, and that the reply was bad, neither of which questions was decided, yet the proof having failed to show that the plaintiff had filed any answer denying her interest in said land, in the action to set aside the deed, and having also failed to show that she had informed the defendant L. at the sale that she had no title to the land, and the court having only ordered the two-thirds of the land to be sold to pay debts, the finding for the defendant was not sustained by the evidence.

APPEAL from the Clay Common Pleas.

DOWNEY, J.—This action was brought by the appellant

against the appellees for partition of, and to quiet the title to, certain real estate. The result of the action was unfavorable to the plaintiff, and she appealed to this court. Four errors are assigned by her; first, the overruling of her demurrer to the separate answer of William H. Long; second, sustaining his demurrer to the second paragraph of her reply; third, overruling her motion for judgment on the pleadings; and, fourth, overruling her motion for a new trial.

It is stated in the first paragraph of the complaint that Christian Miller, the husband of the plaintiff, died the owner of the land in 1867; that she is entitled to one-third of it as his widow, and their children, who are made defendants, to the other two-thirds. It is further stated that Long claims some interest in the land, and, therefore, he is made a party.

In the second paragraph it is stated that Christian Miller died the owner of the land, leaving said widow and heirs; that during his lifetime he and the plaintiff executed a conveyance of said land to William H. Miller; that after the death of said Christian Miller, one Rensselaer became administrator of his estate, instituted his action in the Clay Common Pleas, and on the 9th day of November, 1869, had said deed set aside, and an order made that he should sell two-thirds of said land to make the same assets in his hands; that previous thereto, to wit, on the 19th day of December, 1868, and before the institution of said suit by said administrator, said William H. Miller conveyed all his interest in said land to the plaintiff; that she is the owner of one-third, and said children are the owners of two-thirds thereof; that Long claims an interest in said land, etc. Prayer that one-third of the land be set off to her in fee simple; that her title thereto be quieted; that Long be forever enjoined from claiming any interest in her one-third of said land; and for other relief.

Long answered to both paragraphs of the complaint, that Christian Miller died intestate in August, 1867; that shortly prior to his death he was seized of the land; that on the

Miller v. Long et al.

7th day of August, 1867, he, with intent to hinder, delay, and defraud his creditors, and without good or valuable consideration, conveyed said land to said William H. Miller; and that the plaintiff aided in such fraud, and knowing the intent of her said husband, colluded with him and joined in said deed. It is also stated that Rensselaer was appointed administrator of the estate of said Christian Miller, and filed in said court his petition, alleging said fraud, to which the plaintiff and said William H. Miller were made defendants; that they made defence, and answered that the property was the sole property of said William H. Miller, and that said Elizabeth had no interest in the same whatever; that the court found that the deed from said Christian to said William H. Miller was fraudulent and void, ordered that the same be set aside as to two-thirds of said land, and ordered it sold to pay the debts of said deceased; that the same was accordingly sold by the administrator to one Miles, and the sale approved by said court; and that the court also rendered a judgment in favor of said administrator against said William H. and Elizabeth for the costs of the action, amounting to seventy-seven dollars and ninety-five cents; that an execution was issued on the judgment for costs, which was levied upon all the interest of William H. Miller in and to said land; that it was advertised and sold by the sheriff to said Long for one hundred and forty-six dollars under and by virtue of said writ; that his interest was, and is, one-third of said real estate; and that the sheriff gave to said Long a certificate of purchase therefor. It is then alleged, "that at the time of, and prior to, the sale of said one-third interest by the sheriff to this defendant, the said plaintiff represented and held out to the public generally, and to this defendant, that she was not the owner of any portion of said land, but that William H. Miller was the owner thereof; that the deed made by the said William H. Miller had been rescinded and was void, the same never having been delivered by the said William H. Miller; wherefore, etc.

The second paragraph of the reply states that at the time

the said defendant purchased the pretended interest of the said William H. Miller in and to said land, he was fully informed of the interest of the plaintiff in the same; that she, by her attorneys, presented a schedule duly made out and sworn to, as the law directs, to the sheriff of said county of Clay at the time said defendant bid on the same, and before he had made any bid, which schedule contained a description of said land; and that she then and there, by her said attorneys, notified the said sheriff and said defendant that she was the owner of the one-third of said land, in her own right, and demanded that the same be set off to her under the law authorizing three hundred dollars to be set off to householders and heads of families; and so she says that the defendant had full knowledge of the rights of the plaintiff in said land before he purchased the same at said sheriff's sale, etc.

Conceding that the answer of Long is good, which question we do not think it necessary to decide, and conceding that the demurrer to the second paragraph of the reply was properly sustained, we are of the opinion that there was no evidence to justify the finding against the appellant on the issue formed by the denial of the answer of Long.

The record of the suit by Rensselaer, the administrator of Christian Miller, does not show that Elizabeth Miller filed any such answer as alleged in the answer of Long. But aside from this, the court, by its finding and judgment in that case, subjected only two-thirds of the land to sale for the payment of the debts of the deceased, leaving the widow's one-third unaffected by that judgment. As she had joined in the deed of her husband to William H. Miller, and as William H. Miller had conveyed to her, the one-third of the land was left vested in her in fee simple.

There was a judgment for costs against her and William H. Miller in the suit of the administrator against them, and an execution on that judgment was levied upon a supposed interest of William H. Miller in the land, and that interest was sold to Long, but this did not, of itself, affect the inter-

The State, *ex rel.* Matthews, *v.* Chase *et al.*

est of Elizabeth Miller. To estop her from setting up the interest which she thus had in the land, it is alleged in the answer of Long that at the sheriff's sale she "represented and held out to the public generally, and to this defendant, that she was not the owner of any portion of said land, but that William H. Miller was the owner thereof," etc. We regard it as immaterial what representations she made to "the public generally," but we think if she represented to Long, at the time of the sheriff's sale, that she had no interest in the land, that William H. Miller was the owner of it, and if Long, on the faith of these statements, bought the land, paid for it, and took a certificate, these facts might constitute an estoppel. But these facts are not proved. On the contrary, it is stated in the bill of exceptions that it was agreed on the trial that the plaintiff, by her attorneys, gave public notice to bidders at the sheriff's sale that the plaintiff was the owner of one-third of the land described in the complaint. The evidence wholly fails to show any admission or statement made by her to the contrary of this, at the time of the sheriff's sale, and does not, we think, make out the alleged estoppel. We have not been aided by any brief from the appellee.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial.

W. W. Carter and *S. D. Coffee*, for appellant.

41	356
132	472
41	356
152	630

THE STATE, EX REL. MATTHEWS, *v.* CHASE ET AL.

INTERLOCUTORY ORDERS.—*Appeals*.—*Supersedeas*.—*Attachment*.—The section of the code authorizing appeals from interlocutory orders, which requires an appeal bond to be filed when the appeal is taken, does not require any additional bond in order to suspend the proceedings for thirty days; but an appeal from an order of injunction does not allow a party to do an act, which by

The State, *ex rel.* Matthews, *v.* Chase *et al.*

the injunction he is forbidden to do. The stay of proceedings upon the appeal is peculiarly applicable to other classes of cases mentioned in the section. The arrest of a party for disobeying an order of injunction, within thirty days after appeal, and after the issuing of an ordinary *supersedeas*, is not an act in disregard of the authority of the Supreme Court. An ordinary *supersedeas* is not appropriate in such a case.

DOWNNEY, J.—This is a petition for a mandate, filed originally in this court. The facts stated in the petition are, that on the 18th day of March, 1873, Judge Chase, of the Cass Circuit Court, in vacation, awarded a temporary injunction against Matthews, at the suit of Dutton. From this order of the judge granting such injunction, Matthews immediately appealed to this court. On the 24th day of March, 1873, the transcript was filed in this court, and on the same day a *supersedeas* was ordered, by one of the judges of this court, in the usual conditional form, but no bond, other than the bond filed when the appeal was granted, has since been filed. It is alleged that, by virtue of the statute, such appeal operated as a stay of proceedings for thirty days, which time has not yet expired; that, notwithstanding said appeal and *supersedeas* so granted, Judge Chase, wrongfully and without jurisdiction, issued an order causing the relator to be arrested for contempt of his court, for an alleged disobedience of said injunction, when in truth said injunction was no longer in the Circuit Court of Cass county, but was in the Supreme Court, and ordered the relator to be committed to jail or give bond to answer the contempt and to save said Dutton from any damage in the premises, which bond he, on the 25th day of March, 1873, gave, with security to the satisfaction of the sheriff of said county, and which is ample to secure said Dutton against any damages he may sustain in the premises, if the said injunction order shall be approved in this court. He further states that on the 4th day of April, 1873, notwithstanding said Chase first examined said *supersedeas* issued by this court, he caused another and further order to issue, in violation of law and of said *superse-*

The State, *ex rel. Matthews, v. Chase et al.*

deas, and in contempt of the authority of this court, commanding the defendant, William J. S. Manly, sheriff, etc., to seize upon the store of this affiant, lately occupied by Dutton & Matthews, and now belonging to James Matthews, the affiant, and hold the same, and exclude the relator therefrom; by virtue of which order the sheriff has seized upon affiant's said store, to his great damage, etc. He further says that he is not in contempt of the said Cass Circuit Court; that he is simply doing what he believes he has a legal right to do, having taken all necessary steps to bring the case to a hearing in this court; that all of said orders have been issued without any preliminary bonds, and within the thirty days prescribed by statute as a stay of proceedings upon his appeal. He further alleges that the granting of the injunction was erroneous, as appears by his assignment of errors upon said transcript, and that each of said orders has been made *ex parte*, and without any notice whatever to him, and without giving him any opportunity to be heard. He also alleges that he is a clergyman, and now and for four years last past a resident of Logansport, etc., and that said orders have been procured by said Dutton maliciously and for the purpose of injuring his character and standing in said city, and to obtain an unjust demand from him; that he has, in the premises, acted in good faith and under the advice of his counsel, and with no intention of violating law, and he says that his bondsmen are ample and good to secure said Dutton in all damages of every kind which he may obtain in the premises.

The prayer of the petition is, that there may be awarded from this court a writ of mandate, directed to the said Chase, the judge, etc., and Manly, the sheriff, etc., commanding them to obey the said *supersedeas*, and that until the appeal is determined by this court, said Chase, judge of said court, and Manly, as such sheriff, may be by mandate compelled to desist from further molesting him, and prohibited and enjoined from taking any further steps in the premises, either in the said arrest for said alleged contempt, or in the seizure

The State, *ex rel.* Matthews, *v.* Chase *et al.*

of his goods; that his said stock of goods may be restored to him, and that the said sheriff be enjoined and prohibited from enforcing said writ or order above described, and that he may have all proceedings, either by said judge or sheriff, suspended, stayed, and prohibited by said mandate, until the said appeal shall be determined. Dutton is made a party, and the same relief is asked against him.

It appears from documents referred to in the petition, that Dutton and Matthews were partners in the business of selling books, stationery, etc.; that the co-partnership was afterward dissolved; that Dutton filed his complaint, alleging that he was owner of one-half of the goods, etc.; that Matthews had excluded him from any voice or share in the management of the store, etc., and was selling the partnership goods, etc.; wherefore he asked an injunction, the appointment of a receiver, etc. After the granting of the injunction, and the taking of the appeal from the order granting the same, Matthews again engaged in selling the partnership goods, etc., and on affidavit of this fact, he was, by order of the judge, attached for contempt of the authority of the court in disregarding the injunction, and when he had entered into a recognizance to answer for the contempt, etc., and was discharged, he again renewed the sale of the partnership property, etc., in disregard of the injunction. The court, upon being informed of this fact by affidavit, issued, at the request of Dutton, what is denominated a writ of assistance, by virtue of which the sheriff took possession of the goods, etc., and now holds them.

Without stopping to discuss questions with reference to the form of the remedy, counsel have argued the question as to the effect of granting the injunction, and have asked us to decide that question alone. Counsel for the petitioner contend that when the appeal from the order granting the injunction was perfected, the efficacy of the injunction was at once destroyed, and that, although the party enjoined went on to do the very act which the injunction forbade him to do, the court could not, during the pendency of the

The State, *ex rel.* Matthews, *v.* Chase *et al.*

appeal in this court, and within the thirty days, enforce obedience to and respect for the injunction; that by the appeal, the order for the injunction is no longer in the circuit court, but is removed to this court, and that the power to compel obedience to the same, if vested anywhere, is in this court. Counsel for the defendant herein, on the contrary, insists that the order for the injunction, notwithstanding the appeal, remains in full force and effect, and that the party enjoined cannot legally do the act which he was forbidden by the injunction to do.

This is a question of interest, and not without difficulty. The section of the code relating to appeals from interlocutory orders is as follows: "Appeals to the Supreme Court may be taken from an interlocutory order of any court of common pleas, or circuit court, or judge thereof, in the following cases: First. For the payment of money; to compel the execution of any instrument of writing, or the delivery or assignment of any securities, evidences of debt, documents, or things in action. Second. For the delivery of possession of real property, or the sale thereof. Third. Granting or dissolving, or overruling motions to dissolve, an injunction in term, and granting an injunction in vacation. Fourth. Orders and judgments upon writs of *habeas corpus*, made in term or vacation." 2 G. & H. 277, sec. 576.

The next section provides the mode of taking and perfecting the appeal. Sec. 578, p. 278, is as follows: "Such appeal shall not stay proceedings upon the order more than thirty days, unless the Supreme Court in term, or some judge thereof in term or vacation, shall otherwise order."

The *supersedeas* granted in the case to which reference is made in the petition was the common form of *supersedeas* adapted to cases where no appeal has been taken and bond filed in the court below, as contemplated by section 562 of the code. Such a *supersedeas* contemplates the giving of a bond after it has been issued. The section last cited provides, that the court or judge shall, at the time of making the order, direct that the appellant give bond to the appellee,

with condition that he will duly prosecute his appeal, and abide by and pay the judgment and all costs which may be rendered or affirmed against him. Accordingly, the form commonly used, and that which was used in this case, directs that execution and other proceedings on the judgment be stayed, "whenever the appellant shall have given bond according to law." As the appeal from an interlocutory order can only be taken at the term of the court when the order is made, or if made in vacation, at the time the order is made, or during the next term of the court, a bond must always be executed and filed when the appeal is taken, or within such time as the court may direct; and there is no provision in the code authorizing an appeal in such cases by obtaining a transcript and filing it in this court, etc., as contemplated in other cases, according to section 556 of the code. We conclude that the stay of proceedings beyond the thirty days, provided for by the 578th section of the code, is special in its nature; that it is made upon a proper showing, and in a proper case, without the execution of any bond other than that given when the appeal was taken, and that the *supersedeas* granted in this case was not such as was adapted to the case. So far, then, as the petition relies upon the acts done as being in violation of the *supersedeas*, and for that reason in contempt of the authority of this court, it has no foundation on which to rest.

The fact remains, however, that the appeal was taken from the order granting the injunction, and the proper appeal bond was given. The acts of the appellant which are relied upon as in violation of the injunction were done within the thirty days from the taking of the appeal. What effect had the appeal upon the order granting the injunction? In our opinion, it did not have the effect to authorize or allow the party to do the act which by the injunction he was forbidden to do. The general theory of injunctive relief, except so far as our code has changed the doctrine, is that some act is about to be done by the defendant which will result in such injury to the complaining party as cannot be compensated

The State, *ex rel.* Matthews, *v.* Chase *et al.*

in damages that can be recovered in an ordinary action at law. If the party enjoined can, by appealing, go on and do the act which will result in the irreparable damage, compel the party who has obtained the injunction to seek his redress in an action for damages on the appeal bond, there would seem to be no material advantage in obtaining an injunction in such a case against such injurious act. The same would be true in every case where, by the code, an injunction is authorized. If it be said that the party obtaining the injunction must rely upon the remedy on the appeal bond, and allow the party enjoined to go on and do the injurious act, may it not, with greater force, be said that the party enjoined must rely upon his remedy on the injunction bond, and refrain from doing the act? It is probable that, as a general rule, less harm will result to the party enjoined from refraining from doing an act, in obedience to an injunction forbidding it, than would result to the party obtaining it from the doing of the act from which the irreparable damage is apprehended. As one of the parties must rely upon a bond for his security and indemnity, we can see no good reason for saying that it shall be the obligee in the appeal bond, rather than the obligee in the injunction bond.

But it is contended that the appeal stays proceedings upon the order. This is true, but not in such sense as to allow the party enjoined to do the act which he has been forbidden by the injunction to do. See *Burton v. Burton*, 28 Ind. 342, and *Nill v. Comparet*, 16 Ind. 107. Strictly, in most cases, there are no further proceedings upon an order for an injunction. With reference to some of the other matters in other clauses in section 576, this is not true. If the order be for the payment of money, or for the delivery of the possession of real property, for instance, there is something to be done by the party against whom the order is made, and in such cases the appeal does stay proceedings upon the order. The court which made the order cannot, in the one instance, compel the payment of the money, or in the other, the delivery of the possession of the land, during the time

of the stay. It is to such cases that the provision for the stay of proceedings upon the order is peculiarly applicable. If the defendant will not observe the injunction, will not refrain from doing the injurious act, and it becomes necessary for the court to enforce obedience to it, in consequence solely of the wrongful act of the defendant, it cannot, in any true sense, be said that this is a proceeding upon the order. It is the defendant who is attacking the order and refusing to allow the matter to remain as when the appeal was taken. The court is simply compelling him to respect the order and allow it to stand as made. We cannot adopt the theory that by the appeal the order made is no longer in the circuit court, but is transferred to this court. The original order, and the original papers upon which it was made, remain in the circuit court. Only a transcript of them comes to this court. The judge of the circuit court had the power to award the attachment for a violation of the injunction, in vacation, upon a proper showing by affidavit. 2 G. & H. 136, sec. 149, *et seq.*

As to the writ of assistance, we decide nothing. If it is illegal, perhaps a motion should be made, in the first place, in the circuit court to set it aside, and restore the property taken under it. The charge in the petition that the proceedings have been actuated by malice may be more appropriate in a complaint for malicious prosecution.

The motion for the mandate is overruled, at the costs of the plaintiff.

OSBORN, J.—I cannot concur with the majority of the court in their conclusion as to the effect of an appeal from an order of injunction.

The section of the statute declaring the effect of the appeal upon proceedings upon interlocutory orders is general, and in terms applies to all that may be appealed from. The fact that one requires and another prohibits action, in my opinion, can make no difference. The statute makes no distinction. That, in effect, declares that the appeal shall

The Water Works Company of Indianapolis *et al.* v. Burkhardt *et al.*

stay all proceedings upon the order for thirty days, without any order from the Supreme Court or a judge thereof, and longer, if such court or judge shall so direct.

Proceedings upon the order must be some act predicated upon it to enforce obedience to its commands. Disobedience, in one case, would consist in not doing what the order commanded should be done; in the other, in doing what it prohibited from being done. And although the appeal does not dissolve the injunction, it does, in my opinion, under section 628 of the code, stay proceedings upon it for thirty days.

I appreciate the effect that the appeal, under the statute, may in some instances have upon the remedy of the party obtaining the injunction; still, on the other hand, the party enjoined will often suffer irreparable injury unless his appeal shall operate as a stay of proceedings upon the order. At any rate, I think the statute contemplates such stay.

D. P. Baldwin and M. Winfield, for plaintiff.

D. Turpie, for defendants.

41 364
131 451
138 164

41 364
142 467

41 364
154 224
155 480
155 488

41 364
164 386
164 433

THE WATER WORKS COMPANY OF INDIANAPOLIS ET AL. v. BURKHART ET AL.

EMINENT DOMAIN.—Legislative Authority.—Delegation of Power.—The right of eminent domain is inherent in the government. It is not conferred, but limited, by the constitution, and the limit is not upon the amount of the estate to be taken, but it only requires just compensation. No property can be taken without legislative authority, and in the manner, and for the purposes, and to the extent authorized. Courts cannot extend or limit these. The necessity for such condemnation must be determined by the legislature, and cannot be questioned by the courts. If the legislature attempt under this power to take property confessedly not for public use, then the courts may prevent it. Where the State has taken a fee simple or authorized the taking thereof, and compensated the owner therefor, the subsequent abandonment of the use will not reinvest the owner with the title. If simply an easement is taken, the rule is otherwise. The right of determining the necessity of the work may be

The Water Works Company of Indianapolis *et al.* v. Burkhart *et al.*

delegated, and courts and juries may be called upon to determine as to its necessity.

SAME.—Canals.—Ice.—The legislature of this State authorized its public agents to appropriate a fee simple in the lands taken for the construction of its canals. The former owner had no right to take ice from the canal.

STATUTE.—Repeal by Implication.—The law does not favor the repeal of statutes by implication, and when courts hold that a statute or any provision thereof is repealed by implication, it is done in obedience to the legislative will as manifested in the act. It must appear that the subsequent statute revised the whole subject-matter of the former one, and was evidently intended as a substitute for it, or that it was repugnant to the old law.

EMINENT DOMAIN.—Canal.—Right to Take Ice.—*Edgerton v. Huff*, 26 Ind. 35, overruled.

APPEAL from the Marion Civil Circuit Court.

OSBORN, J.—The appellees sued the appellants, and in their complaint it is alleged that they are tenants in common and owners in fee simple of a tract of land, described in the complaint, through which the Central Canal runs, in Marion county. "That as such owners they have the right, and are entitled, to cut the ice growing upon the Indiana Central Canal, where the same runs through the premises, using ordinary care, and without unnecessary damage to the canal; that the defendants claim that they are the owners of the canal, and have the sole and absolute right to cut the ice growing upon it, to the exclusion of the plaintiffs; that during the winter of 1871 and 1872, the defendants prevented the plaintiffs from cutting the ice growing upon the canal, where the same is situated upon and runs across the real estate of the plaintiffs aforesaid. And the plaintiffs say that by reason of such unlawful interference of said defendants, in preventing the plaintiffs from cutting ice upon said canal, and selling the same as merchandise, the plaintiffs were deprived of large incomes, profits, and gains, to which they were lawfully entitled as the owners of the real estate."

They demanded judgment for five thousand dollars, and an order that they were entitled to and had the right to cut the ice growing upon the canal, without hindrance by the defendants, and for all proper relief.

The general denial was pleaded, and the cause was tried

The Water Works Company of Indianapolis *et al.* v. Burkhart *et al.*

by the court, resulting in a finding for the appellees for fifty dollars. The appellants filed a motion in which they severally moved for a new trial; first, because the finding of the court was not sustained by sufficient evidence; second, because the finding was contrary to law.

The motion was overruled, to which proper exceptions were taken, a bill of exceptions was filed, and judgment was rendered on the finding.

The errors assigned are, first, that the court erred in overruling the motion for a new trial; and, second, in rendering final judgment against the appellants.

The evidence is in the record, and consists in an agreed statement of the facts, as follows:

The plaintiffs below, the appellees, are the heirs of Andrew J. Burkhart, deceased, who died intestate. The real estate described in the complaint was, on the first day of January, 1836, the property of Nathaniel West, who was seized in fee simple of the same. West died in 1843, leaving certain heirs, naming them, and by agreement amongst the heirs, and certain partition proceedings mentioned, this land was set apart and partitioned to certain of the heirs named, through whom, by regular conveyances, the title became vested in Burkhart. No question has been made about the appellees' title to the land, except as it may be affected by the appropriation for the canal.

The Board of Internal Improvements, for the purpose of constructing the Central Canal, and to procure a right of way therefor, appropriated a strip of land through said real estate, and constructed thereon the bed of said canal, its banks, margins, and towpaths. West's damages, occasioned by such appropriation, were assessed, as provided by law, and paid to him as follows: September 30th, 1837, seven hundred dollars, and February 25th, 1839, two hundred and fifty dollars. The Board of Internal Improvements entered upon the strip of land so appropriated, and constructed upon it the bed, banks, margins, and towpaths of the canal. The canal thus constructed continued the property of the State,

and in its possession, until the 30th of June, 1850, when it was conveyed by the governor and auditor, by deed, to Francis A. Conwell, assignee of George G. Shoup, James Raridan, and John S. Newman, the deed being the same mentioned in the preamble to an act passed March 9th, 1859, for the relief of the lessees from the State of the water power, etc., on the northern division of the Central Canal, etc.

The Central Canal, which was constructed by the State under the acts upon the subject of internal improvements and conveyed to said Conwell, is the same canal passing through the real estate described in the complaint, and through the city of Indianapolis, and the portion thereof passing through said real estate is the subject of litigation in this action.

The canal passed by a united chain of title, by proper conveyances, to the defendant, The Indiana Central Canal Company, a corporation organized and created on the 13th of January, 1863, under "an act to provide for the organization of canal and water works companies, and for the completion of the unfinished canals in the State of Indiana," approved June 17th, 1852.

The defendant, The Indiana Central Canal Company, on the 1st day of May, 1870, by a proper deed of conveyance, conveyed said canal to the defendant, The Water Works Company of Indianapolis, a corporation organized under an act authorizing the formation of companies for the construction, etc., approved March 6th, 1865. The company was organized on the 7th day of October, 1869. The articles of association are set out, and by the sixth its business was declared to be "that of furnishing water, which it may do to the city and citizens of Indianapolis, the State, public institutions, firms, and individuals, and all desiring the same in said city and the vicinity thereof."

The agreed statement of facts concludes as follows: "The plaintiffs claim the right to pass upon and over the banks of said canal, where it passes through said real estate, doing no

The Water Works Company of Indianapolis *et al.* v. Burkhardt *et al.*

unnecessary damage thereto, when the water in said canal is frozen, and the water in the same cannot be used for navigation or hydraulic purposes, and cut ice upon said canal, and carry it away, to be used as a matter of merchandise.

"The defendant, The Water Works Company of Indianapolis, denies this right, and during the winter of 1871 and 1872, prior to the bringing of this suit, forbade its exercise by the plaintiffs, and deprived them of it.

"That the exercise of this privilege by the plaintiffs is a valuable one, and it is agreed that if upon the facts of this case the plaintiffs are entitled to the privilege claimed by them, their damages shall be assessed at fifty dollars. If, upon the contrary, under the facts of the case, the plaintiffs are not entitled to the privileges claimed by them, then the finding of the court shall be for the defendants."

The real question to be decided is, what interest did the State acquire in the land by the appropriation? It appropriated, paid for, and took possession of, a strip of land, the width of which is not stated, and constructed upon the strip so appropriated the bed, banks, margins, and towpaths of the canal, and continued to own and possess it until conveyed in 1850. And the defendants, claiming under several regular conveyances, now own, and are in possession of, all that the State acquired. It is not claimed that there has been any abandonment or forfeiture of any right thus acquired. The plaintiffs below, the appellees, only claim, in their complaint, that they have the right to cut the ice formed upon the canal where it passes through their land, using ordinary care, and without unnecessary damage to said canal. And, in the agreed case, they claim the right to pass over the banks of the canal where it passes through their land, doing so with ordinary care, and doing no unnecessary damage thereto, when the canal is frozen, and the water in the same cannot be used for navigation or hydraulic purposes, and cut ice upon it, and carry the same away, to be used by them as a matter of merchandise.

It is admitted that the State acquired, and that the defend-

The Water Works Company of Indianapolis *et al.* v. Burkhart *et al.*

ants now own, some interest in the canal, where it passes over and across the appellees' land, including its bed, banks, margins, and towpaths; that the State took possession of this strip, and thereon constructed the canal, its banks, margins, and towpaths, during the existence of the Board of Internal Improvement, and that the State, and those holding under it, continued in the possession of such strip, until the bringing of this action, and during the time that the plaintiffs claim damages for being deprived of the right to go upon and take ice from the canal.

A supplemental brief has been filed, in which, among other things, it is claimed that The Water Works Company is not authorized to own and maintain a navigable canal, and therefore could not take the Central Canal; but it is expressly agreed by the appellees, that if they are not entitled to the privileges claimed, the finding of the court shall be for the defendant.

Hence, we think, we have really only to determine what power the legislature possessed to appropriate the property, and what interest or estate was appropriated.

And first, as to the power.

The right of eminent domain, that is, the ultimate right of the sovereign power to appropriate, not only the public property, but the private property of all the citizens within the territorial sovereignty, to public purposes, is inherent in the government; without this power, the State could not establish and open a highway of any kind. No railroad, canal, or turnpike could be constructed; no ground upon which to build a public building could be procured by the State, or government, in any other way than by contract with the owner. It is not conferred, but limited by the constitution. The limitation does not relate to the amount of the estate in property to be taken; only that "no man's property shall be taken by law without just compensation, nor, except in case of the State, without such compensation first assessed and tendered."

The Water Works Company of Indianapolis *et al.* v. Burkhart *et al.*

It is to be exercised only when the public exigencies require it. And when such exigency or necessity is declared by the representative of the sovereignty, the legislature, the courts cannot rightfully question the wisdom of the declaration. No property can be taken for public use by condemnation otherwise than by legislative authority, and in the manner and for the purposes authorized. Courts cannot extend or limit it. The power to condemn land for a turn-pike gives no power to condemn for a railroad, although, in fact, the necessity for the latter may be greater than for the former. There may be no necessity for constructing a railroad along side of, and parallel to, another; yet, if the legislature has declared the public necessity for it by authorizing its construction, and conferred the right to appropriate the requisite land for that purpose, courts cannot prevent it by questioning the necessity for the work.

If the legislature attempts, under the power of taking property under the right of eminent domain, to take property confessedly not for public use, then the courts may prevent it. And here, it seems to us, is where a misconception arises. It is said, and admitted, that no more shall be taken than is necessary for the public, but the manner of determining that question, and the tribunal before which it shall be determined, has, by many, been entirely overlooked. And the case of *In re Albany Street*, 11 Wend. 149, has been referred to as sustaining the doctrine that the courts would undertake to decide, in the face of a legislative declaration of public necessity, that no such necessity existed. An examination of that case will show that it was an attempt to appropriate what the legislature admitted was not necessary. The act under which it was proposed to take the land, provided that when a part of a lot was required, if the commissioners deemed it expedient to include the whole lot in the assessment, they might do so, and the part not wanted for the street, etc., should become vested in the corporation, who might appropriate it to public use, or sell it. It was held that the corporation could not appropriate the part of the lot not wanted

The Water Works Company of Indianapolis *et al.* v. Burkhart *et al.*

for the street; that is, the owner could not be required to sell what it was admitted the public necessity did not require; that if a part of a lot was demanded by public exigency, that did not confer the power to take the remainder as a matter of expediency. *Embury v. Conner*, 3 Comst. 511, was made under the same, or a statute with similar provisions.

In the case of *The People v. Smith*, 21 N. Y. 595, DENIO, J., says, on page 598:

"The necessity for appropriating private property for the use of the public or of the government is not a judicial question. The power resides in the legislature. It may be exercised by means of a statute which shall at once designate the property to be appropriated and the purpose of the appropriation; or it may be delegated to public officers, or, as it has been repeatedly held, to private corporations established to carry on enterprises in which the public are interested. There is no restraint upon the power, except that requiring compensation to be made." The court held that the party was not entitled to be heard on the question of the expediency of making the appropriation.

The exercise of the right of eminent domain stands on the same ground with the power of taxation. Both are emanations of the law-making power. They are the attributes of political sovereignty, for which the legislature is under no necessity to address itself to the courts. "In imposing a tax or in appropriating the property of a citizen, or a class of citizens, for a public purpose, with a proper provision for compensation, the legislative act is itself due process of law."

In *United States v. Harris*, 1 Sumner, 21, on page 42, Judge STORY says: "The right, therefore, to take private property for public uses is limited to cases of public exigency. If the legislature expressly, or by necessary implication, state the exigency to exist, and the extent to which the property is to be taken, that would in common cases be decisive."

In *Ford v. The Chicago, etc., R. R. Co.*, 14 Wis. 609, it was

The Water Works Company of Indianapolis *et al.* v. Burkhardt *et al.*

decided, that "the propriety of taking property for public use is not a judicial question, but one of political sovereignty, to be determined by the legislature, either directly or by delegating the power to public agents, proceeding in such manner and form as may be prescribed."

In *Kane v. The Mayor, etc.*, 15 Maryland, 240, it was held, that under the forty-sixth section of the third article of the constitution of that State, and the act of the legislature authorizing the city to adopt means for supplying the city with water, the authority was not given to take property for all purposes, but for "the purpose of conveying water into said city, for the use of said city, and for the health and convenience of the inhabitants thereof." The opinion was not unanimous. Tuck, J., dissented, on the ground that the act of the legislature made the city authorities judges of the expediency and necessity of what property was needed, etc. But the majority seem to have decided that an issue of fact could be formed, and evidence heard, as to the public exigency.

We think such a doctrine untenable, and, that, practically, it would lead to confusion. If courts can call in question, and control the extent of the interest or estate which the legislature may authorize to be taken, we can see no reason why the exercise of the power to appropriate and take any interest may not in like manner, and for the same reason, be questioned and controlled, or even denied and prevented. On the same ground, the right to appropriate land upon which to construct a railroad can be called in question. An issue of fact can be made, that the public exigency does not require the construction of the road, or the amount of land which the legislature has authorized to be taken. And thus courts and juries would be sitting in judgment and passing upon what the legislature had decided was required by the public. And the result might be that different verdicts and judgments might be rendered, relative to the power to take parts of adjoining tracts of lands, for the same purpose and on the same state of facts. One jury might decide that the

road was, and another that it was not, required by the public wants. One might decide that the quantity of the lands that the legislature had authorized to be taken was, and another that it was not, necessary; and thus the construction of any railroad could be defeated by the verdict of a single jury; an act of the legislature nullified by the judgment of a single court.

Heyward v. The Mayor, etc., 7 N. Y. 314, discusses this question, and as the language of the court in that case accords with our views, we quote from it. After speaking of the doctrine of eminent domain, the court says, on pages 324-5: "With these general views of the right of eminent domain, it is proper to inquire with a little more particularity and precision into its character and extent. Does it imply the right in the sovereign power to determine the time and occasion and as to what particular property it may be exercised? Most clearly it does, from the very essence and nature of the right. To deny it would be to abrogate and destroy it. 2 Kent Com. 340, 3d ed.; *Beekman v. Saratoga, etc., R. R. Co.*, 3 Paige, 73; *Varick v. Smith*, 5 Paige, 159, 160. Shall the same power determine the estate or quantity of interest in the lands which shall be taken; whether an estate for years, for life, or in fee; whether a right of reversion in any event shall be left in the owner, or whether a mere easement shall be taken, without divesting the fee and general ownership of the land? It seems to me entirely clear that all these powers must of necessity rest in the legislature, in order to secure the useful exercise and enjoyment of the right in question."

In that case, under an act of the legislature, certain real estate had been appropriated, taken, appraised, and paid for by the city of New York, for the purpose of extending the almshouse establishment. It was provided in the law under which it was taken, that the city should be seized in fee simple of the lands, tenements, and premises so taken. The city took possession of the land, and occupied it for many years for the purposes for which it was authorized to take it.

The Water Works Company of Indianapolis *et al.* v. Burkhardt *et al.*

Afterward, the city resolved to remove the almshouse to Randall's Island, and surveyed the land so taken and laid it out into city lots, and sold them, and conveyed the lots by deeds, with covenants of general warranty. A suit was afterward brought for an account of the amount realized on the sale beyond the sum originally paid on the condemnation. The court held that the legislature had the power to authorize the appropriation of the fee simple; that when so appropriated and paid for, no reversionary interest or estate remained in the former owner, and if the public exigencies required the conversion of the property to some other public purpose, it could be done, and that no action lay for the account; that having received a full indemnity, and payment for the property, the former owner was not entitled to anything more.

De Varaigne v. Fox, 2 Blatchf. C. C. 95, seems to have been upon the same facts, and with the same result.

In *Haldeman v. Pennsylvania Central R. R.*, 50 Pa. St. 425, it is said, that it is not to be overlooked that the reason why the right of the owner of the land taken reverts to him when the public cease to use it for the purpose for which it was taken, is because the State made, at first, but a partial appropriation; that if the fee had been acquired by purchase, or taken through its right of eminent domain, and devoted to public use as a highway, a cessation of that use could revest nothing in the former owner; that his rights would be gone and he could not resume possession.

In *Rexford v. Knight*, 1 Kernan, 308, a strip of land had been taken, and at one time actually occupied and used, as a part of the Erie canal; when the canal was enlarged, its location was changed, and the premises in controversy were no longer used for that purpose.

The question was, whether the title did not revert to the original owner. The court held that it did not; that the language of the act of the legislature that the property should be deemed the property of the State, excluded the idea that any one else retained a property in it; that it was

The Water Works Company of Indianapolis *et al.* v. Burkhart *et al.*

so broad as to require a fee; and that under such a state of the title, the lands would not revert upon the abandonment of their use for the purpose of a canal. Courts have decided that where an easement is taken, as is usually done in establishing common highways, the fee remains in the owner, and when the road is vacated the right appropriated reverts. In such cases the public only gets a right of passage; that is all that the legislature has declared to be necessary. So in some railroad charters, a grant is made to the company to appropriate land for its use, for right of way, depot grounds, and the like, with a provision that when the provisions of the charter have been complied with, the company shall be seized of the lands so taken in fee simple, whilst in others only an easement is granted. There may be, in fact, the same necessity for a fee simple in both cases, yet the courts cannot inquire into and decide that such necessity does or does not exist, or change the estate acquired. And so the legislature may grant to different companies power to take a greater or less quantity of land, and such grant will be conclusive as to the necessity for the uses specified. The right of determining the necessity of the work may, undoubtedly, be delegated, as is done in this State in the establishment of common highways, and the erection of mill-dams, and in those cases the courts and juries may be called upon to determine as to its necessity. But the legislature is the sole and exclusive judge of the public exigency, and of the mode and manner of exercising the right of taking the property required, subject only to the limitation of making proper provision for ascertaining and making compensation for the property taken.

We do not consider it necessary to further refer in detail to authorities, but cite a few of the many examined. *Dingley v. City of Boston*, 100 Mass. 544; *The Brooklyn Park Commrs v. Armstrong*, 45 N. Y. 234; *Hatch v. Cincinnati, etc., R. R. Co.*, 18 Ohio St. 92; *Cooper v. Williams*, 4 Ohio, 253; *In the matter of the Water Commissioners v. Lawrence*, 3 Edw.

The Water Works Company of Indianapolis *et al.* v. Burkhart *et al.*

Ch. 552; *New Castle, etc., R. R. Co. v. Peru, etc., R. R. Co.*, 3 Ind. 464; *Craig v. Mayor, etc.*, 53 Pa. St. 477.

We proceed to inquire what estate the Legislature authorized its public agents to appropriate in lands taken for the construction of its canals.

By an act of the General Assembly, approved January 9th, 1832 (Acts of 1832, p. 3), the duties of the canal commissioners were defined and extended. It will be unnecessary in this case to state all of their duties. They were authorized to construct the Wabash and Erie canal as far as located, and of the residue of the canal aforesaid, from the Ohio state line to the Tippecanoe river, as established by the act of the General Assembly mentioned. Section 9, p. 6, provided, that "it shall and may be lawful for said canal commissioners, or each of them, or any of their agents, superintendents, engineers, or workmen acting under them, to enter upon and take possession of, and use all and singular, any lands, or waters, streams and timber, stone or materials of any kind, necessary for the prosecution of the improvements contemplated by this act; and to make all such canals, feeders, dykes, locks, dams, and other works, as they may think proper in said prosecution, doing however no unnecessary damage." The commissioners were authorized to receive, on behalf of the State, from the owners of any such lands, such grants and conveyances as might be proper and competent to vest a good title thereof in the State, and also to receive grants of such materials as they might need. Provision was also made for estimating the loss or damage, if any, over and above the benefit arising from the canal to such owner, in said premises or materials taken and appropriated for any of the purposes mentioned, in case the same should not be given or granted. Section 11, p. 7, prohibited the erection of any bridge across said canal, the building of any wharf, basin, or watering place; the making or applying of any device whatever, for the purpose of diverting or turning any water from the said canal, or the feeders connected therewith, without first obtaining permission therefor from the

canal commissioners, under a penalty not exceeding one thousand dollars. By section 19, p. 53, Acts of Feb. 1st, 1834 (Acts, 1834, p. 49), a penalty was imposed upon any one who should lead, drive, or ride any animal, horse, ox, mule, or other animals, upon the towing-path or berme-bank of the Wabash and Erie canal, except for the purposes of conveying articles to and from said canal, for transportation on its waters. Section 18, same page, authorizes the commissioners to procure, "by purchase or otherwise," land at each and every point on or adjoining the Wabash and Erie canal, where its surplus water might be profitably used for hydraulic purposes. By act of February 6th, 1835, p. 25, section 4, p. 26, the commissioners were directed to file all applications for damages growing out of the construction of the Wabash and Erie canal, or works connected therewith, for the location or completion of the canal, or any of the structures thereto appertaining. The board of appraisers should make an equitable assessment of the damages, etc., make regular entries of their award, in each case, in a book to be kept for that purpose, and the commissioners were then required to pay the several awards, which should vest a fee simple in the premises so appropriated in the State.

Section 5 required the governor to appoint appraisers, and prescribed their duties. Section 6 provided for leasing the surplus water, not needed for navigation, but prohibited selling or leasing such surplus water unless the ground on which it was proposed to be used should be the property of the State. Section 7 reserved to the State the right to resume the use of the water whenever it was deemed necessary for purposes of navigation. Section 10 of the same act, p. 28, directed the canal commissioners to survey and locate a canal, from a suitable point on the Wabash and Erie canal, *via* Muncietown, etc., and Indianapolis, at or near the White river, thence to a point on the Ohio river.

The act of 1836, p. 6, provided for a general system of internal improvement. Section 1 provided for the appointment of a board of internal improvement. Section 2 provided,

The Water Works Company of Indianapolis et al. v. Burkhart et al.

among other things, that the board should take the same oath then required by law of the canal commissioners. Section 4 specified the works which the board was to adopt measures to commence, construct, and complete, including the Central canal (which was the same that was authorized to be surveyed and located by section 10 of the act of February 6th, 1835), and an extension of the Wabash and Erie canal. Appropriations were made for each particular work. Section 16 authorized the board, and each of its members, by engineers, etc., to enter upon and take possession of, and use, any lands, streams, and materials, for the prosecution and completion of any of the improvements contemplated by the act. Section 17 prescribed that persons feeling aggrieved or injured by the construction of the works, etc., should file with the member of the board having the superintendence of the work, which was supposed occasioned the injury, a written statement of the cause of complaint. The board should refer it to appraisers to be appointed by them, and fix the time of the meeting of such appraisers, etc. The award of the appraisers should be final, unless appealed from to the circuit court; and when the appeal was taken, it should be governed by the same rules and regulations as appeals from justices of the peace. It also provided that the board should pay the amount fixed by the appraisers or court. What should be the tenure of the state to the ground taken, or appropriated and appraised, is not declared by the act. Section 21 fixes the compensation of the appraisers, and repeals so much of the laws in force as provides for creating, continuing, or compensating a state board of appraisers. It does not seem to have been the intention of the General Assembly to repeal all former laws on the subject. The act changed the officers having the control and management of the works. It created a board of internal improvement, and gave to that board the powers theretofore conferred upon the canal commissioners, with some modifications. It authorized the construction of many works not before authorized, including railroads, macadamized and turnpike roads.

So that the name of "canal commissioners" ceased to be appropriate or proper. It seems to have been the purpose of the state to continue all the works already commenced, and also to commence and prosecute others, under the same laws, so far as the same might be applicable under the new board of internal improvement. The manner of appropriating the property, taking the releases and appraising damages for the property taken, was substantially the same under both laws. Under the act of 1835, it is provided, that payment of the award of damages should "vest the fee simple of the premises so appropriated in the state." Acts of 1835, p. 26, sec. 4. The act of 1836 provided, that the board of internal improvement should pay the award, and was silent as to the effect of it. Acts of 1836, p. 13, sec. 17. Both acts provided for taking and appropriating the land; for filing a statement of the claimant; for an assessment of his damages; an appeal and trial in the appellate court, and payment of the damages assessed or awarded. The only real change was, that by the act of 1835 the governor appointed a board of appraisers, whilst under the act of 1836 the board of internal improvement referred each case to three disinterested persons, selected by themselves. The state, prior to the act of 1836, had undertaken the construction of the Wabash and Erie canal; it had authorized the survey and location of a canal, which, by the last named act, was designated as and called the Central canal, from some point on the Wabash and Erie canal, and other canals, railroads, turnpikes, and macadamized roads. In the act of 1835, which declared that the appropriation and payment of the award of damages should vest the fee simple of the land taken in the State, provision is made for the location of the Central canal and many others of the works which were placed under the control of the board of internal improvement by the act of 1836. The commissioners were to make estimates of the cost of some of the works, and lay them before the then next General Assembly. The next General Assembly passed the act of 1836, and placed not only the

The Water Works Company of Indianapolis *et al.* v. Burkhart *et al.*

Wabash and Erie canal, but all the public works of the state under the control of the board of internal improvement. The board was charged with the extension of the Wabash and Erie canal, in the same act that directed them to locate and construct the other works. By a law already in force, the effect of condemning land, whereon to construct that canal, was to vest the fee simple in the state. The state was about to embark in a more extensive system, to undertake the construction of other canals, etc., and the completion of this one already commenced. We are to determine whether the state intended to take a less estate in the ground appropriated for the extension of that canal, and in the construction of the others, than she had before taken, and declared it necessary to take, for its construction.

The argument of the appellees is, that by the act of 1836 all other acts on the subject were repealed. It is not denied, that by condemnation the state acquired the same estate in the land condemned, whether it was for the Wabash and Erie, or any other of the canals authorized to be constructed by the board. Indeed, we do not see how it could be. They were to be located and constructed by the same board, and for the same purpose. Evidently the legislature considered that there was the same necessity for all, and it intended to confer and extend the same power for the benefit of all. The legislation is *in pari materia*.

By the act of 1835, the appraisement and payment of the damages vested the fee simple of the land appropriated in the State, and unless that act was repealed by the act of 1836, such would continue to be the effect of such appraisements and payment. The only express repealing clause in the act is in section 21, page 15, which repeals so much of the laws then in force, as provided for creating, continuing or compensating a state board of appraisers.

The law does not favor a repeal by implication; and though two acts may seem to be repugnant, courts will so construe them that, if possible, the later shall not operate

The Water Works Company of Indianapolis *et al.* v. Burkhart *et al.*

as a repeal. *Bruce v. Schuyler*, 4 Gilman, 221; *Blain v. Bailey*, 25 Ind. 165.

The re-enactment of an existing provision of a law, in a later statute, does not, necessarily, repeal such former provision. 22 Ind. 1; 9 Ind. 337; 10 Ind. 566. The law does not favor repeal of statutes by implication, but requires clearly repugnant language to effect a repeal. 5 Ind. 41; *Coghill v. The State*, 37 Ind. 111. Where courts hold that a statute, or any provision thereof, is repealed by implication, it is done in obedience to the legislative will, as manifested in the act. It must appear to have been the intention of the legislature. *Tyson v. Postlethwaite*, 13 Ill. 727. Judge CATON, on page 734, says: "This principle is illustrated in the opinion of Lord Ch. J. NORTH and the other judges, in an answer to a question put to them by the Privy Council, reported by Sir Thomas Raymond, at page 397. There a perpetual law had been passed, granting certain revenue out of strong liquors; and subsequently another law was passed, granting the same revenue for two years; and it was held that the last law did not repeal the first, but that the latter continued after the expiration of the former. 'According to the case of the prices of wine, Hob. 215, where by 37 Henry 8, chap. 23, a perpetual law was made for settling prices of wine; then, by the statute of 5 Edward 6, the said perpetual act (through the inadvertence of parliament) was continued, amongst other acts, till the end of the parliament, which continuance was resolved to be idle as to that act; for an affirmative continuance of a perpetual statute cannot work an abrogation thereof.'" So a general statute, without negative words, will not repeal a particular provision of a former one, unless the two are irreconcilably inconsistent. Sedgw. Statutory Law, 123.

The case of *Haldeman v. Pennsylvania Central R. R.*, 50 Pa. St. 425, in some particulars is like this. The State of Pennsylvania, in 1826, enacted a law for appropriating land for a canal, and, on complying with its terms, vesting the title as of an absolute estate in perpetuity in the State. In 1827,

The Water Works Company of Indianapolis *et al.* v. Burkhart *et al.*

another act was passed, making some changes in the mode of ascertaining damages. In this second act there is no direct reference to the estate, or quantity of interest, which the State would acquire in the lands by the appropriation. After an acquisition, subsequent to the second act, of land for the canal, and constructing the canal upon the land thus acquired, the State filled up and removed the canal from the land, and appropriated it to other uses and purposes from that for which it was originally taken. In an action of ejectment, it was held that the land did not revert to the former owner; that, standing alone, the second act did not seem to contemplate an acquisition of the fee, but that the acts of 1826 and 1827 were *in pari materia*; that the latter did not repeal the former, except so far as it made inconsistent provisions for compensating owners of land taken, and that both acts must be construed together as parts of one system.

It seems to us that it was not the purpose of the legislature, by the act of 1836, that the State should abandon any work or system already commenced, or acquire any less estate in lands to be thereafter taken for the construction of any of its public works. On the contrary, it appears to have been the purpose, not only to finish all that she had undertaken, but to commence and finish others, and she conferred the management and control of the whole of them upon the Board of Internal Improvement, with authority to take and appropriate lands for the construction of all of them, without distinction or discrimination.

It is said by the appellees that the act of 1836 repealed all prior laws on the subject; that it covered the subject of the old ones, and therefore took their place; that it was a revision, embracing the same general subject-matter, and reduced all the old laws into one, and hence was a virtual repeal of them, without any express provision to that effect. A number of authorities are cited to sustain the position.

Goodenow v. Buttrick, 7 Mass. 142, is the first cited. In that case, Bigelow, for defendant, contended, as the appel-

The Water Works Company of Indianapolis *et al.* v. Burkhart *et al.*

lees do here, that the former laws were repealed by implication, and that it had been always considered that the revised statutes virtually repealed the old laws *in pari materia*, without any express clause of repeal. But the court held that the last act did not repeal the act relied on by the plaintiff in that case; that it did not appear to comprise several provisions of the former laws, undoubtedly intended to be preserved.

Bartlet v. King, 12 Mass. 555, is the next. In that case it was held that the subsequent statute, revising the whole subject-matter of a former one, and evidently intended as a substitute for it, although it contained no express words to that effect, must, on general principles of law, as well as in reason and common sense, operate to repeal the former.

Norris v. Crocker, 13 How. U. S. 429, is the next. In that case, on page 439, it is said: "The recent statute covers every offence found in the former act, which subjects the offender to a penalty of five hundred dollars, and prescribes a new, and different penalty, recoverable by indictment; and is plainly repugnant to the act of 1793."

United States v. Tynen, 11 Wal. 88, is the next and last case cited on that point. In that case, on page 92, Mr. Justice FIELD said: "When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first."

It must appear that the subsequent statute revised the whole subject-matter of the former one, and was evidently intended as a substitute for it, or that it was repugnant to the old law. In other words, it must appear that it was the intention of the law-makers to repeal the former law. When that appears, the will of the law-makers is just as manifest as if it had been shown by express words.

As early as 1832, the legislature, by law, declared that the condemnation of land for the construction of the canal should vest a good title to the premises in the State. It

The Water Works Company of Indianapolis *et al.* v. Burkhart *et al.*

claimed absolute dominion over, and the exclusive possession of, the canal. It prohibited the diversion of water from it, the construction of any bridge across it, etc., without first obtaining permission from the commissioners, and imposed a penalty for offending against the prohibition, not exceeding one thousand dollars. It authorized the commissioners to receive grants and conveyances for the construction of the canal as might be proper and competent to vest a good title in the State. In 1834, it asserted its right to exclude all persons from the banks of the canal by declaring that every person who should lead, drive, or ride any horse, ox, mule, or other animal upon the towing path or berme-bank of the canal, except, etc., should forfeit three dollars. In 1835, it provided, that the condemnation of land should vest the title, in fee simple, in the State. In 1838, it was enacted that every person who should lead, ride, or drive any horse, ox, or other animals drawing after them any cart, dray, or other carriage upon the towing path or berme-bank of any of the canals of this State should forfeit fifteen dollars. It again prohibited the construction of bridges, wharves, basins, etc., except under the direction of the commissioners. Indeed the entire legislation of the State has been based upon the theory that she had the entire ownership of, and dominion over, the canals and their banks, and that the owners of the land through which they were constructed had no right to the possession of them. The State did not tolerate any privilege or rights in any one to go upon the canal, or its banks, at any time, as a matter of right. It could only be done by permission. She did not recognize the right of the owner of the land through which the canal ran to go over and upon its banks, or take from it anything, simply because it did not, for the time being, interfere with the use of the water for hydraulic purposes, or the navigation of the canal, or that no injury was done to the canal. Having declared the necessity for the ownership and exclusive possession of the land, she denied the right to any and all others to enter upon it, at any time, without her permission. She occupied

this position until the transfer of her interest. The entire history of the legislation and action of this State shows that it was not her intention to repeal the law by which the fee simple of the lands taken for the canals was vested in the State. It shows that her intention and policy was to exclude all persons from the possession of such lands, unless by her permission. The claim exercised by the State continuously from 1832 to the entire and absolute ownership and exclusive possession of the property appropriated and seized for the construction of its canals was utterly inconsistent with any joint or temporary use or possession by the former owner. The courts also recognized the interest taken to be the entire estate, and allowed the owner the full value of it in estimating his damages. *Vanblaricum v. The State*, 7 Blackf. 209. That was a case for damage occasioned by this same Central canal. The same rule was recognized in *M'Intire v. The State*, 5 Blackf. 384.

In the first named case, Judge BLACKFORD uses this language: "In estimating the complainant's damages, the jury were to ascertain the value of his land, taken for the canal, at the time it was taken." It was not the value of an interest, or estate, in the land less than the whole, but the value of the land taken, that was to be estimated.

Our conclusion is, that it was the intention and purpose of the legislature, by the legislation on the subject, to appropriate a fee simple in the land seized or taken for the construction of her canals as well after as before the act of 1836.

Our conclusion is in conflict with *Edgerton v. Huff*, 26 Ind. 35. The court in that case based the right of the trustees of the canal entirely upon the act of 1836, and instead of considering the prior legislation on the same subject in aid of the right acquired by the State, it was regarded as weakening it, while we regard the entire legislation on the subject as parts of one system, the former not repealed unless by express enactment, or by necessary implication. In that opinion the power of the legislature is not questioned.

The Water Works Company of Indianapolis *et al.* v. Burkhart *et al.*

nor is the conclusiveness of the legislative declarations of the public exigency questioned. It simply holds that by the act of 1836, standing by itself, the legislature did not attempt to appropriate anything more than an easement.

In *Haldeman v. Pennsylvania Central Railroad, supra*, it was insisted that the act of 1827, under which the land was taken, did not authorize the taking of a fee. The court said: "There is no direct reference in this second act to the estate or quantity of interest which the commonwealth should acquire in the lands appropriated without purchase and for which the compensation to be made was to be settled by viewers, and if it is not to be construed in connection with the first act, there is nothing in it that gives any different effect to the appropriation from that which generally results from laws providing for taking private property for public use as a highway. Standing alone the act does not seem to contemplate an acquisition of the fee by the commonwealth. But the acts of 1826 and 1827 are *in pari materia*. It follows that both acts must be construed together, as parts of one system."

We cannot, of course, tell what the court, as then constituted, would have held if the question had been presented as it has been to us. Yet we cannot but believe that its conclusions would have been the same as ours are in this. At all events, it does not seem to have been considered. That case is overruled.

The judgment of the said Marion Civil Circuit Court is reversed, with costs, with instructions to grant a new trial, and on the said agreed statement of facts to find and render a judgment for the defendants.

T. A. Hendricks, O. B. Hord, A. W. Hendricks, A. G. Porter, B. Harrison, C. C. Hines, S. E. Perkins, and S. E. Perkins, Jr., for appellants.

J. Hanna, F. Knefler, and B. K. Elliott, for appellees.

The appellant, in argument, presented the following points and authorities:

The State acquired a fee simple by the condemnation of real estate for canal purposes, under the internal improvement act of the 27th of January, 1836.

The Water Works Company of Indianapolis *et al.* v. Burkhart *et al.*

The legislature may authorize the acquisition of real estate for street, railroad, canal, or other public use, to be held by a fee simple title, and this may be acquired by grant, or by the exercise of the power of eminent domain. The character of the title acquired is merely one of legislative intention.

Cooley Const. Lim. 558; *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234; *Nicoll v. The New York, etc., R. R. Co.*, 2 Kern. 121; S. C., 12 Barb. 460; *Heyward v. The Mayor, etc., of New York*, 3 Seld. 314; S. C., 8 Barb. 486; *Embury v. Conner*, 3 N. Y. 511; *People v. Kerr*, 27 N. Y. 188; *In the matter of Peter Townsend*, 39 N. Y. 171; *In the matter of New York, etc., Co. v. Kip*, 46 N. Y. 546; *Roxford v. Knight*, 15 Barb. 627; S. C., 1 Kern. 308; *In the matter of the Water Commissioners v. Lawrence*, 3 Edw. Ch. 552; *De Vaux v. Fox*, 2 Blatchf. C. C. 95; *Dingley v. The City of Boston*, 100 Mass. 544; *Commonwealth v. M'Allister*, 2 Watts, 190; *Haldeman v. Pennsylvania Central Railroad*, 50 Pa. St. 425; *Newcastle, etc., Co. v. Peru, etc., Co.*, 3 Ind. 464; *The President, etc., Co. v. The City of Indianapolis*, 12 Ind. 620; *Gillespie v. Broas*, 23 Barb. 370.

The following citations of acts of Congress, statutes of the State, etc., were made to show that the intention was to acquire a fee simple:

Subdivision three of section six, 3 U. S. Stat. at Large, 290; *id.* 424; 4 *id.* 47; *id.* 236; *id.* 416; *id.* 716; 5 *id.* 414; *id.* 542; *id.* 731.

Acts of 1828, 10; Acts 1829, 13; Acts 1830, 13; *id.* 172; sections 1, 2, 3, 4, 5, 9, and 13 of act of January 9th, 1832, Acts of 1832, 4; sections 1, 4, 6, 10, of act of February 6th, 1835, Acts of 1835, 25; section 4 of act of February 7th, 1835, Acts of 1835, 31; sections 1, 9, 10, 14, 16, 17, 18, 22, 23, 44 of the general internal improvement act of the 27th of January, 1836, 6, Acts of 1836, and R. S. 1838, 336; section 5, of the act of January 20th, 1842, Acts of 1842, 35; section 6 of the act of January 31st, 1842, Acts of 1842, 30; sections 1, 4, 9, 19, 23, 24, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 55, 58 of the act of February 28th, 1842, Acts of 1842, 3; section 4 of act of February 10th, 1843, Acts of 1843, 33; sections 248, 264, and 265 of article 16 of chapter 13 of the R. S. 1843, R. S. 1843, 272, 274, and 275; section 1 of act of January 10th, 1845, Acts of 1845, 9; sections 1, 2, and 3 of act of January 13th, 1845, Acts of 1845, 10; sections 8, 9, 10, and 33 of act of January 19th, 1846, Acts of 1846, 3; also Acts of 1847, 3, and 1 G. & H. 689; section 1 of act of January 28th, 1847, Local Acts of 1847, 260; section 3 of act of 19th of January, 1850, Acts of 1850, 21; sections 1 and 3 of act of January 21st, 1850, Acts of 1850, 22; the message of the governor to the 35th session of the general assembly that met December 30th, 1850; Documents, p. 113; joint resolution of February 7th, 1851, Acts of 1851, 200; sections 1, 6, 7, and 9 of act of February 13th, 1851, Local Acts of 1851, 358; preamble of the act of March 9th, 1859, Acts of 1859, 167, 1 G. & H. 210; the deed of the State to Francis A. Conwell, dated June 30th, 1851, conveying to the grantee the northern division of the Central canal. This is the conveyance mentioned in the preamble to the act of March 9th, 1859. Sections 1, 6, 8, and 9 of act of June 17th, 1852, Special Acts of 1852, 93, and 1 G. & H. 205; section 1 of act of November 16th, 1865, Acts of special session of 1865, 116; Act of January 15th, 1849, Local Acts of 1849, 73.

The Water Works Company of Indianapolis *et al. v. Burkhart et al.*

The State was providing a permanent system traversing the State, connecting the lakes with the Ohio river.

The State had no means of water communication, and railroads had not yet been developed. Real estate was of little or no value, the great body of it selling for Congress price. It was to be the property of the State. The State required in all cases that it should be the fee simple owner of the real estate upon which the water-power was leased, and necessarily would desire to hold the canal by as high a title as the real estate upon which the water was to be used for mill purposes.

In addition to this, the forty-fourth section of the act of 1836, requires that the act shall be "favorably and liberally construed."

The canal acts authorize the condemnation of a fee simple.

Section 8 of the act to incorporate The Jeffersonville and New Albany Canal Company, Local Acts of 1836, 243; sections 2 and 5 of the act to incorporate the Brookville and Richmond Canal Company, Local Acts of 1838, 159; sections 2, 3, 5, 7, and 18 of the act to incorporate The White Water Valley Canal Company, Local Acts of 1842, 37; section 14 of the act to incorporate The Indiana Canal Company, Local Acts of 1849, 98.

The acts creating the railroad companies chartered about the time of the enactment of the internal improvement act of 1836, authorized the condemnation of a fee simple for a right of way. The act to incorporate The Evansville and Vincennes Railroad Company, Local Acts of 1836, 149; the act to incorporate The Crawfordsville, Covington, and Illinois Railroad Company, Local Acts of 1836, 165; an act to incorporate The Princeton and Wabash Railroad Company, Local Acts of 1836, 183; an act to incorporate The Lafayette and Danville Railroad Company, Local Acts of 1836, 229; an act to incorporate The Perrysville and Danville Railroad Company, Local Acts of 1836, 227.

This has been the policy of the State as to all the important railroad lines; The Peru and Indianapolis Railroad Company, Local Acts of 1846, 210; The Terre Haute and Richmond Railroad Company, Local Acts of 1847, 77; The Indiana Central Railway Company, Local Laws of 1851, 80; The Ohio and Mississippi Railroad Company, Local Acts of 1848, 619; The Junction Railroad Company, Local Acts of 1848, 468; The Indianapolis and Bellefontaine Railroad Company, Local Acts of 1848, 176; The Jeffersonville Railroad Company, Local Acts of 1849, 364; Local Acts of 1850, 424; Local Acts of 1851, 520.

The same is the policy of the State, even under our general railroad laws.

Sections 1, 13, 14, 15, 16, 18, of the general railroad act of May 11th, 1852, 1 G. & H. 504.

The act of May 11th, 1852, is to be construed in connection with the chapter for "assessment of damages," 2 G. & H. 310.

McMahon v. Cincinnati, etc., Co., 5 Ind. 413; *Board of Comm'rs of La Grange Co. v. Cutler*, 6 Ind. 354. This chapter authorizes the condemnation of a fee simple. Also act of March 7th, 1863, Acts of 1863, 33.

When real estate was taken by the State, by condemnation, for the Central canal, the owner was paid the full value of his land. No interest less than a

The Water Works Company of Indianapolis *et al.* v. Burkhart *et al.*

fee simple absolute was considered, in estimating the owner's damages. In *Vanblaricum v. The State*, 7 Blackf. 209, the rule is stated thus: "In estimating the complainant's damages, the jury were to ascertain the value of his land, taken for the canal, at the time it was taken."

See, also, *M'Intire v. The State*, 5 Blackf. 384; *The State v. Digby*, 5 Blackf. 543; *The State v. Beackmo*, 8 Blackf. 246; *Kimble v. The White Water Valley Canal Co.*, 1 Ind. 285.

See also, on this subject, Angell on Highways, sec. 115 (2d ed.).

In the case of *Kimble v. The White Water Valley Canal Co.*, 1 Ind. 285, which was a condemnation under the charter of that company, hereinbefore set out, it is said: "After such assessment of damages, and the payment thereof, the property taken is evidently intended to be vested permanently in the company."

All the statutes upon the subject of canals, being *in pari materia*, must be construed together, to ascertain the legislative intention as to the character of the interest the state acquired in canal lands. *The State v. Beackmo*, 8 Blackf. 246; *Rexford v. Knight*, 15 Barb. 627; S. C. on appeal, 1 Kernan, 308; *Commonwealth v. M'Allister*, 2 Watts, 190; *Haldeman v. Pennsylvania Central Railroad*, 50 Pa. St. 425.

In New York and Pennsylvania, from which our system is borrowed, the state acquired a fee simple absolute, in the lands acquired for canal purposes, whether by condemnation or deed. *Baker v. Johnson*, 2 Hill N. Y. 342; *The People v. Hayden*, 6 Hill N. Y. 359; *Rexford v. Knight*, 15 Barb. 627; *Rexford v. Knight*, 1 Kernan, 308; *Gillespie v. Broas*, 23 Barb. 370; *In the matter of the Water Commissioners v. Lawrence*, 3 Edw. Ch. 552; *Commonwealth v. M'Allister*, 2 Watts, 190, 197, 198; *Union Canal Company v. Young*, 1 Whart. 410; *Haldeman v. The Pennsylvania Central Railroad*, 50 Pa. St. 425; *Plitt v. Cox*, 43 Pa. St. 486; *North Branch Canal Company v. Hires*, 44 Pa. St. 418.

The question of change of legislative policy presented in *Edgerton v. Huff*, 25 Ind. 35, was presented both in New York and Pennsylvania, as shown by the cases cited. The legislation of those states is so strikingly like ours in its changes, that we infer that our State followed them step by step.

The case of *Edgerton v. Huff*, 25 Ind. 35, was incorrectly decided, if the State acquired a mere easement.

There was no water on the land until the State brought it there, and the land-owner was paid for the burden of having his land used for the passage of the water. The State necessarily acquired the absolute proprietorship of the water in the canal. The uses to which it was to be applied forbade a divided ownership.

The statutes show that the exclusive possession and use were in the State, and that the land-owner was excluded from the use of the banks of the canal.

The land-owner was not in the position of a riparian proprietor.

The cases cited by the court were between the State and the owners of the bed of the water-course from which it was proposing to take water.

Brooks v. Harris.

They do not present the question as to the right to the water after it got into the canal, except the New York case, and that is overruled. They cited *The Saffordshire, etc., Co. v. The Birmingham, etc., Co.*, 35 Law. J. (N. S.) Ch. 757; 1 N. S. Law Rep. H. L. 254; and *Hatch v. The Cincinnati, etc., R. R. Co.*, 18 Ohio St. 92.

41	390
140	160

BROOKS v. HARRIS.

SET-OFF.—Judgments.—The fact that judgments are rendered in different courts does not prevent either party from having the one set off against the other.

SAME.—Judgment Against Principal.—There must be mutuality in the claims, in order that they may be set off against each other; but where a judgment has been obtained on the relation of A. against B. and his sureties on a constable's bond, B. may have a judgment obtained by him against A. set off against the judgment on the bond.

PLEADING.—Written Instrument.—Judgment.—A judgment is not a written instrument within the meaning of the statute requiring copies of written instruments in pleading.

SET-OFF.—Appeal.—The fact that an appeal has been taken to the Supreme Court from the overruling of an application to allow an appeal from a justice of the peace, after the time limited, does not prevent the judgment from being satisfied by setting off another judgment against it, unless a stay of proceedings be had on the appeal.

SAME.—Equitable and Legal Title.—Although an equitable title to the judgment has been acquired by a stranger before the motion is made by the judgment defendant to have it satisfied by being set off against another judgment, yet the legal title will control the equity and authorize the satisfaction.

SAME.—Motion.—Pleading.—Practice.—A motion to satisfy judgments, by setting them off one against another, does not require a complaint or pleading.

APPEAL from the Marion Common Pleas.

WORDEN, J.—Harris filed his motion in writing in the court below, stating, in substance, that on the 13th of January, 1871, Bennett Brooks recovered a judgment against him for one hundred and fourteen dollars and forty cents in that court, a copy of which was filed and made an exhibit; that on the 18th of March, 1871, he recovered a judgment against the said Brooks before Henry H. Boggess, a justice

of the peace of Center township, in said county of Marion, for the amount of eighty-four dollars and ninety cents, including costs, a copy of which was also filed. He moved to set off the amount of the latter judgment against the former.

The first exhibit filed with the motion shows the recovery of a judgment by the State, upon the relation of Bennett Brooks, for the one hundred and fourteen dollars and forty cents, on a constable's bond, against Charles E. Harris, John Furniss, and Levi Wright, jointly.

The second exhibit shows the recovery of a judgment by Harris against Brooks, before the justice of the peace, as specified in the motion.

The motion was filed on the 26th of April, 1871, and notice thereof served on the defendant on the 27th of the same month.

The defendant appeared and filed an answer of five paragraphs. The first was pleaded in abatement, and alleges, in substance, that after the expiration of more than thirty days from the recovery of the judgment by Harris against him, before justice Boggess, he made application to the said court of common pleas for leave to appeal from said judgment to said court of common pleas, but that such leave was refused, and that from such refusal he took and perfected an appeal to the Supreme Court, where the cause was then pending and undecided.

The second paragraph was the general denial, which was afterward withdrawn.

The third alleges that on the 20th of January, 1871, and before notice of the motion, for a valuable consideration, he sold the judgment recovered on his relation against Harris, Furniss, and Wright to one Samuel Penn, subject to the lien thereon of attorneys for fees.

Fourth. That on the 20th of January, 1871, and before notice of the motion for set-off, for a valuable consideration, he agreed to sell and assign said judgment recovered on his relation against Harris, Furniss, and Wright to one

Brooks v. Harris.

Samuel Penn, and afterward, to wit, on the 28th of April, 1871, in pursuance of said agreement, he assigned on the record of said Marion Common Pleas Court all his interest in said judgment to said Samuel Penn, a copy of which assignment is filed, etc.

Fifth. That on the 28th of April, 1871, he assigned by writing on the record of said court of common pleas all his interest in said judgment recovered on his relation against Harris, Furniss, and Wright to one Samuel Penn, a copy of which assignment is filed, etc.

The assignment is as follows:

"For value received, I assign to Samuel Penn all my interest in this judgment. April 28th, 1871.

"BENNETT BROOKS.

"Attest: WM. J. WALLACE, Clerk."

Demurrers were sustained to each of the paragraphs of the answer, except the second, which was withdrawn, and the defendant excepted. Thereupon the cause was submitted to the court for trial and finding, as the record shows; and the court, after hearing the evidence, found, amongst other things, that the judgment recovered upon the relation of Brooks against Harris and others was on the bond of Harris as constable, and that Furniss and Wright were his sureties thereon.

The set-off was adjudged as prayed for.

Brooks appeals and assigns errors which bring in review the rulings on the several demurrers.

It is insisted that the motion, which may be regarded as a complaint, does not state facts sufficient to authorize the set-off, and, therefore, that the demurrer should have reached back, and that the complaint should have been held bad.

We do not decide that any complaint was necessary. In *Hill v. Brinkley*, 10 Ind. 102, it was held that the courts would, on motion, set off judgments in the same, and in different, courts. If no complaint was necessary, then no pleadings were necessary, and all defences could have been introduced on the hearing of the motion without pleading;

and in that view the appellant was not injured by the ruling upon the demurrers.

But we will consider the case as if pleadings were necessary, and determine first whether the written motion was good as a complaint, which, it is obvious, must be the case if it stated facts sufficient to entitle the plaintiff to have the set-off made.

The specific objections are that the judgments set off against each other were rendered in different courts, and that they lacked the essential element of mutuality.

We are of opinion that the fact that the judgments were rendered in different courts does not take away the right to have the set-off made. The right of the parties to have one judgment made to cancel another *pro tanto* is just as perfect where the judgments are rendered in different courts as where they are rendered in the same courts. This objection, in our opinion, is not a valid one.

But under the general principles of our law on the subject of set-off, there must be mutuality in the claims in order that they be set off against each other. We have, however, the following statutory provision:

"In all actions upon a note or other contract against several defendants, any one of whom is principal and the others sureties therein, any claim upon contract in favor of the principal defendant, and against the plaintiff, or any former holder of the note or other contract, may be pleaded as a set-off by the principal or any other defendant." 2 G. & H. 89.

Following the analogy of this provision, and applying the principle thereof to the setting-off of judgments, we are of opinion that the set-off in this case was properly made. It appears from the finding of the court that the judgment recovered by the State, upon the relation of Brooks, against Harris and the other two defendants therein was upon the bond of Harris as a constable, and the other two defendants therein were sureties on the bond. Hence Harris was the principal in that judgment. The judgment belonged to Brooks, the relator, as much as if the suit had been in his

Brooks v. Harris.

own name, and not in that of the State. There is no reason, therefore, on the ground of the want of mutuality, why the judgment which was recovered by Harris against Brooks should not be set off against it.

But the written motion, which we are treating as a complaint, does not show that the judgment recovered by Brooks was recovered against any one else than Harris. The copy of the judgment set out as an exhibit shows, to be sure, that it was recovered against Harris, Furniss, and Wright, but it does not show, except perhaps inferentially, which was principal and which were sureties. But the judgments were not written instruments within the meaning of the statute requiring copies of written instruments to be set out. *Lytle v. Lytle*, 37 Ind. 281. And not being required to be set out by copy or otherwise, they constitute no part of the complaint. *The Excelsior Draining Co. v. Brown*, 38 Ind. 384. We have a complaint, then, setting up the recovery of a judgment against Harris alone by Brooks, and seeking to set off against it a judgment recovered by Harris against Brooks. The complaint is, therefore, in this respect, good on its face. The allegation that Brooks recovered a judgment against Harris would be true if he recovered it against Harris and others. Had Brooks pleaded that the judgment which he recovered was against Harris and the others, Harris might have replied that he was principal and the others mere sureties. This was not done, but the correct result was reached by the finding and judgment of the court. There is, in our opinion, no valid objection to the complaint.

The first paragraph of the answer was insufficient to bar or abate the action. There had been no appeal taken from the judgment in favor of Harris, against Brooks, before Esquire Boggess. The time limited for the taking of such appeal had been suffered to expire, and an application had been made and overruled to allow such appeal to be taken after the time limited, and an appeal had been taken to the Su-

preme Court from the overruling of such application. All this does not affect the judgment. Execution might have been issued upon it, and for all purposes it seems to us to have been a subsisting valid judgment. If application had been made to stay the proceedings in the cause until the decision of the question presented by the appeal to the Supreme Court, doubtless the court could have ordered such stay. *Suydam v. Hoyt*, 1 Dutcher, 230. But no such application was made.

We may consider the other paragraphs of the answer together. It may be doubtful whether any of the paragraphs show such an assignment of the judgment recovered by Brooks against Harris and others to Penn as to vest in him the legal title thereto. The statute requires such assignments to be made "on, or attached to, the entry of such judgment or decree." 2 G. & H. 366, sec. 1. *Burson v. Blair*, 12 Ind. 371. But we decide nothing upon this question. It is not claimed, in either of the paragraphs, that the assignment was actually made until after the institution of this proceeding to make the set-off, nor until after the notice thereof had been served on the defendant. Penn was a purchaser *pendente lite*, and took his interest subject to the result of the suit. *Kern v. Haslerigg*, 11 Ind. 443. At the time of the institution of this proceeding, the legal title to the judgment was in Brooks. Penn may have acquired an equitable interest in it prior to that time, but as the legal title was then in Brooks, Harris had the legal, as well as the equitable, right to have the set-off made. Where the equities are equal, the law prevails. We are of opinion that the demurrers were properly sustained to the several paragraphs of the answer. We do not intimate any opinion as to the question whether the set-off would have been defeated if the assignment had been made before the institution of this proceeding, in view of the general policy of our law, which does not, in general, permit the transfer of a claim so as to defeat a proper set-off thereto.

Carney v. Street et al.

There is no error in the record, and the judgment must be affirmed.

The judgment below is affirmed, with costs.

J. M. Johnston, for appellant.

C. H. Test, D. V. Burns, and G. S. Wright, for appellee.

CARNEY *v.* STREET ET AL.

PRACTICE.—*Appeal from Superior Court.—Assignment of Error.*—An assignment on appeal to the Supreme Court from a judgment of affirmance in the Superior Court, "that the court below in general term erred in affirming the judgment and finding of the court in special term," presents for review all the questions which were properly presented and decided at the general term.

SAME.—*Trial by Court.—Appeal.*—Where a judge is substituted for a jury in the trial of a case, the same rule applies on appeal as to the reversal on the sufficiency of the evidence, as though a jury had rendered the finding.

APPEAL from the Marion Superior Court.

DOWNEY, J.—The appellees sued the appellant for six hundred and fifty dollars, which they allege he promised to pay them, in part consideration of certain real estate conveyed to him by their grandfather, Matthew Carney, the father of the appellant. The defendant answered by a general denial. There was a trial by the court without a jury, and a finding for the plaintiffs. The defendant moved the court for a new trial, but his motion was overruled, and final judgment rendered against him, in favor of the plaintiffs, for the amount of the finding. On appeal from the special to the general term of that court, it was assigned as error, first, that the court in special term erred in overruling the demurrer of the defendant to the complaint; second, in striking out the second paragraph of the defendant's answer; and, third, in overruling the defendant's motion for a new trial. An examination of these alleged errors in the general term

resulted in an affirmance of the judgment of the special term.

From the judgment of the general term the defendant below appealed to this court, and he has here assigned as error, first, that the judgment of the court below is not sustained by sufficient evidence; second, that the judgment of the court below is contrary to law; third, that the court below in general term erred in affirming the judgment of the court below in special term; fourth, that the court below in general term erred in not reversing the judgment and finding of the court in special term, and in refusing a new trial to appellant; and, fifth, the court below erred in overruling appellant's motion for a new trial.

According to an intimation in *Wesley v. Milford*, *post*, p. 413 the third assignment of error is sufficient to present to this court for review, all the questions which were properly presented to, and decided by, the general term.

No question is made here upon the first or second errors assigned in general term; that is, the overruling of the demurrer to the complaint, and the striking out of the second paragraph of the answer. But it is contended that the general term erred in not sustaining the third assignment of error, which was that the special term erred in refusing to grant a new trial. The ground relied upon by counsel for appellant is, that the evidence was not sufficient to justify the finding against him. It is insisted that the evidence does not show that Matthew Carney conveyed the land mentioned to the appellant, upon the agreement that he should pay the six hundred and fifty dollars to the plaintiffs, and that the appellant accepted the conveyance with that understanding.

We think the finding is not unsupported by the evidence. The court in special term tried the cause as it might have been tried by a jury. Had there been a jury trial, and had the jury found a verdict for the plaintiffs below, we think the court would not have been required to set it aside and grant a new trial on account of the insufficiency of the evidence to justify it. The same rule is applicable to cases where the is-

Kern, Executor, *et al.* v. Maginniss *et al.*

sues of fact are tried by the court, instead of a jury. The court, in special term, on the trial, and again on the motion for a new trial, and the general term in passing upon this alleged error, considered the evidence sufficient. We do not feel required or authorized, after a careful examination of the evidence, to decide otherwise. We concede that the evidence is not very decidedly in favor of the appellees, but still we think there was such, and so much, evidence in support of the finding of the court, that we cannot, being governed by the rule upon which this court has always acted in such cases, disturb the action of the superior court in the matter.

The judgment is affirmed, with five per cent. damages and costs.

N. B. Taylor and E. Taylor, for appellant.

W. Wallace, for appellees.

KERN, EXECUTOR, ET AL. v. MAGINNISS ET AL.

PRACTICE.—Partition.—Appeal.—An appeal will not lie from an order of partition and the appointment of commissioners to make such partition, until after the return and confirmation of the report.

APPEAL from the Lawrence Common Pleas.

WORDEN, J.—Complaint by the appellees against the appellants for the partition of certain real estate. Partition was adjudged and commissioners appointed to make the same, who were required to make their report at the next term of the court. This appeal was taken from the judgment of partition without waiting for the return and confirmation of the report of the commissioners. Both parties have assigned errors. The appeal was prematurely taken. The judgment of partition was interlocutory, and not a final judgment, from

Davis et al. v. Langsdale.

which an appeal lies to this court. Nor was it one of the interlocutory orders from which an appeal is authorized by section 576 of the code. 2 G. & H. 277. Previous adjudications fully settle this proposition. *Reese v. Beck*, 9 Ind. 238; *Shroyer v. Lawrence*, 9 Ind. 322; *Griffin v. Griffin*, 10 Ind. 170; *Wood v. Wilkinson*, 13 Ind. 352. The last two cases cited are exactly in point.

The appeal is dismissed, at the cost of the appellants.

S. W. Short, for appellants.

F. Wilson and *A. C. Voris*, for appellees.

41	399
125	395

DAVIS ET AL. v. LANGSDALE.

MORTGAGE.—*Foreclosure.*—*Redemption.*—*Statute.*—L. held a mortgage on certain real estate to secure the payment of four promissory notes, payable in one, two, three, and four years, executed by B. The first note was paid when due, and L. assigned the second to G. When that note became due, G. instituted suit to foreclose the mortgage and collect the note, making L. and certain other junior incumbrancers parties as defendants. L. filed a cross complaint setting up his notes and uniting with G. in the request for the foreclosure of the mortgage. The decree declared the rights of G., L., and other junior incumbrancers. The order of sale was issued at the instance of G., and the property was purchased by him for a sum only sufficient to pay his judgment, and he received the sheriff's certificate. Within the year, L. paid to the clerk the amount of the bid of G., with ten per cent. interest, for the purpose of redeeming. The clerk made the entry showing the redemption, which, however, G. refused to recognize.

Held, in a proceeding instituted by L. to establish and enforce his right to redeem, that L. was entitled to redeem the premises under the statutory provision.

APPEAL from the Marion Civil Circuit Court.

DOWNEY, J.—This was an action commenced by the appellee against the appellants, to establish and enforce his right to redeem certain real estate, which had been sold by

Davis et al. v. Langsdale.

the sheriff, under, and in accordance with, the act of the legislature of June 4th, 1861, found in 2 G. & H. 251. There was a demurrer to the complaint, the demurrer overruled, an answer filed by the defendants, and a demurrer sustained to it. Proper exceptions were taken. Final judgment was rendered for the plaintiff, and the defendants appealed. The errors assigned are, the sustaining of the demurrers to the first and second paragraphs of the answer, in not sustaining the demurrers to the complaint, and in rendering final judgment in favor of the appellee. We need not set out the pleadings in full, nor examine the errors assigned in order. There is but a single question involved, and that can be understood by a short statement of the facts. Langsdale held a mortgage on certain real estate to secure the payment of four promissory notes, payable in one, two, three, and four years from date, executed by one Bond, on the 23d day of August, 1865. The note first maturing was paid, and Langsdale assigned the second to one Gay. When the note assigned to Gay matured, he instituted his action upon it and to foreclose the mortgage, making Langsdale and certain other junior incumbrancers parties as defendants. Langsdale filed an answer or cross complaint, setting up his notes and uniting with Gay in the request for the foreclosure of the mortgage. The decree is very long, and need not be set out at length. The facts found by the court ascertain in detail the rights of Gay, of Langsdale, and of the several junior incumbrancers and purchasers. The decree proceeds to adjudge to Gay a recovery of the amount then due on his note and a foreclosure of the mortgage upon the complaint and the cross complaint. It ascertains that the mortgaged premises were divisible into four parts, which are described, and not further divisible, and directs the sale of those parcels in a prescribed order, having reference to the equities of junior incumbrancers and purchasers. It was directed that, if, by the sale of one or more of these parcels, less than the whole of them, enough should be realized to pay Gay's note, then past due, the further selling should be

postponed, to be resumed when the first note still held by Langsdale should fall due, and that when enough had been sold to pay it, the further sale should be postponed, in like manner, and resumed when his last note should fall due. As to any surplus over the instalment actually due, that might be produced by any such sale, it was directed that it should be applied on the next maturing instalment. But as to the parcel numbered four, it was directed that no part of the proceeds to be derived from its sale should be applied on the two notes still held by Langsdale, he having released the mortgage as to that portion in favor of the purchaser of it.

The proceedings under the first order of sale issued are immaterial, as the sale made under that order was set aside. *Langsdale v. Mills*, 32 Ind. 380.

Upon the second order of sale, which was issued at the instance of Gay, the property was sold and purchased by Gay, realizing an amount sufficient to pay only his judgment. Gay received the sheriff's certificate, which he assigned to the appellants. Langsdale has received no part of the amount due him on his part of the mortgage debt. Within a year from the time of the sheriff's sale, Langsdale paid to the clerk the amount of the bid of Gay, with ten per cent. thereon, for the purpose of redeeming the property, and the clerk made an entry showing the redemption. The appellants, however, disregarded the redemption, and procured the sheriff to execute to them a deed, in pursuance of the certificate of purchase so assigned to them by Gay, etc. It is stated that Bond is insolvent.

The question is, has Langsdale a right to redeem the property, under the statute of 1861? The first section of that act is as follows: "That whenever, hereafter, any real property, or any interest therein shall be sold on any execution or order of sale issued upon any judgment, decree or other judicial proceeding within this State, the owner thereof, his heirs, executors, administrators, or any mortgagee or judgment creditor having a lien upon the same

may redeem such real property or interest therein, at any time within one year from the date of such sale by paying to the purchaser, his heirs or assigns, or the clerk of the court from which such execution or order of sale was issued for the use of said purchaser, his heirs or assigns, the purchase-money, with interest thereon at the rate of ten per cent. per annum."

The position assumed by the appellants, as stated in the brief of counsel, is, that Langsdale, the appellee, does not come within this statute, because he was himself a judgment and execution plaintiff, and, therefore, not authorized to redeem from his own sale, and also because he was neither "a mortgagee nor a judgment creditor having a lien," within the meaning of this statute.

We are inclined to give a liberal construction to this statute. The object of its enactment was to prevent the sacrifice of real estate when sold at sheriff's sale, by allowing it to be redeemed by the owner, or his heirs, executors, or administrators, or by any mortgagee or judgment creditor having a lien upon the same, within the year.

In *The State Bank v. Tweedy*, 8 Blackf. 447, the rights of parties holding notes secured by the same mortgage, first came before this court, and it was then said by the learned judge who delivered the opinion, after alluding to the fact that it was a question for the first time before the court, and after a reference to authorities: "It cannot be stated then, as a general proposition, that in this State, the assignment of any one of the notes secured by a mortgage, carries with it, either *pro rata* or *pro tanto*, a corresponding portion of the mortgage security; but, as appears from what has been said, the effect of such assignment is to carry a *pro tanto* interest in that security subject to the paramount claim of notes previously due. The different instalments in a mortgage, when secured by corresponding notes, may be regarded as so many successive mortgages, each having priority according to its time of becoming payable." Many

other cases have followed this, in which the same doctrine has been held and applied.

In *Crouse v. Holman*, 19 Ind. 30, it was held by this court that a judgment of foreclosure on one of the notes secured by a mortgage could not be pleaded as a bar to a subsequent suit on the same mortgage to enforce payment of another note, because the notes might properly be considered as so many successive mortgages and successive causes of action. See, also, *Sample v. Rowe*, 24 Ind. 208.

In the case under consideration, Langsdale was made a defendant, and set up his notes. A personal judgment was rendered in favor of Gay against Bond, and an order was made for the foreclosure of the mortgage as to the note held by Gay. Upon the cross complaint or answer of Langsdale, a judgment was rendered in his favor foreclosing the mortgage as to the notes held by him. In the case of *Langsdale v. Mills*, *supra*, this court held that, owing to the peculiar form of the judgment of foreclosure, there could be no sale to satisfy the notes held by Langsdale until after Gay's judgment was satisfied, and hence the first sale was set aside. It is clear, we think, that at any time before the sale, Langsdale might have redeemed by paying off the note held by Gay, according to the principles of equity, independent of the statute of 1861. *Murdock v. Ford*, 17 Ind. 52. Is there any reason why he may not do so after the sale, under the statute? He comes fully within the letter of the statute of 1861, authorizing a redemption of the land. He is a judgment creditor having a lien upon the same. He has a lien upon the land as fully as any other junior incumbrancer by judgment has. It is true that there has been a sale of the land, but the title is not passed by such sale. The title passes when the deed is made. Upon a redemption of the land the liens are not displaced or affected, except that the party redeeming has a lien for the amount paid to redeem. Section 3 of the act of 1861, and *The State, ex rel Allen, v. Sherill*, 34 Ind. 57. A sale, with a conveyance made after the expiration of the year from the date of the sale,

will, unquestionably, discharge the premises from any lien for the balance of the judgment on which the sale was made, as well as from the right of junior incumbrancers to redeem, under the statute, whatever may be their rights under the doctrines of equity with reference to redemption. But we cannot adopt the views of counsel for the appellant, that the mere sale of the premises, not consummated by a deed of conveyance, discharges the liens. If this were true, what would be the state of things upon a redemption within the year? Would the lien of all the incumbrancers be gone? If the mere sale discharged the liens, then the act of redeeming within the year must have the effect to revive them, or upon redemption no one would have any lien except only the party redeeming, who is given a lien by the statute.

We think we need not decide or examine the question, discussed by counsel, whether the judgment merges the mortgage or not, as Langsdale had a lien either by the mortgage or by the judgment. We think we ought to hold that, under the circumstances, the claim of Langsdale was so far separate and distinct from that of Gay that he is entitled to exercise the right to redeem, under the statute, as a junior incumbrancer. The case is unlike that where a sheriff has different executions in his hands in favor of different judgment plaintiffs, and sells on all the executions for the benefit of all the creditors. In that case each execution plaintiff can control his own execution, can allow the sheriff to sell upon it or not, and need not place himself in the position of one ordering and directing the sale if he does not wish to do so. In the case under consideration, this was not so. Gay, having the first and paramount claim, could order the execution of the judgment, and direct the time and manner of it, within the requirements of the law, notwithstanding anything that Langsdale might or could do, and the sale, when made by his order, must, in consequence of the form of the judgment, be made for the benefit of Langsdale, so

far as any surplus was concerned, after the payment of the amount due to Gay. It does not appear that Langsdale united in, or consented to, the sale, except by setting up his claim at the date of the judgment. This he was bound to do, having been made a party to the suit, or his lien would have been endangered, if not lost. On the contrary, it may be inferred that he did not assent to it, as he was then asserting a claim under the prior sale, which sale was set aside, as shown in *Langsdale v. Mills, supra*.

We cannot think that, under the circumstances, the sale to Gay can, in any fair sense, be regarded as the sale of Langsdale, when he was not asking or assenting to it, but was opposed to its being made, although the surplus of the proceeds, after paying the claim of Gay, had there been any, might have been applied on his claim. The little control which Langsdale had in the execution of the judgment, had he been disposed to exercise it, is shown by the case of *Langsdale v. Mills, supra*, in which it was held that under the decree as entered there could be no sale to pay the notes held by him until Gay's notes were satisfied.

We have found nothing in the cases from other states, to which counsel have referred us, that has materially assisted us in the decision of the case. It depends almost entirely upon the language of the statute in question, while the cases to which we have been referred are based on statutes differently worded.

The judgment is affirmed, with costs.

H. C. Newcomb, J. L. Mitchell, W. A. Ketcham, T. A. Hendricks, O. B. Hord, and A. W. Hendricks, for appellants.

J. E. McDonald, J. M. Butler, E. M. McDonald, and B. K. Elliott, for appellee.

Brookbank v. The City of Jeffersonville, for the use of Sweeny et al.

BROOKBANK v. THE CITY OF JEFFERSONVILLE, FOR THE USE OF SWEENEY ET AL.

CITY.—Street Improvement.—Transcript.—Advertisement.—The transcript on an appeal from a precept to enforce an assessment for a street improvement must show an advertisement for proposals to do the work.

SAME.—Quorum of Council.—The transcript must also show a quorum of the common council present at the meetings mentioned therein.

SAME.—Remonstrance.—A remonstrance against the proposed improvement is not a part of the transcript.

SAME.—Constitutional Law.—Manner of Sale.—The seventy-first section of the act for the incorporation of cities, directing the manner of sale of property for a street improvement, is not in conflict with section twenty-two of article four of the constitution, prohibiting special legislation regulating the practice in courts of justice.

SAME.—Finding of Court.—Amounts and Dates.—The finding of the court should show the dates and amounts of the several assessments, and from such finding the sheriff can calculate the interest to the date of the sale.

SAME.—Costs.—The costs which accrue upon an appeal from a precept, except the costs of the sale, should be adjudged against the losing party personally.

APPEAL from the Floyd Common Pleas.

BUSKIRK, J.—This was an appeal from a precept to enforce the collection of an assessment for street improvements. By the consent of the parties, the venue was changed from Clark to Floyd county.

The appellant demurred to the complaint. The demurrer was overruled, and this ruling is assigned for error here.

The first objection urged to the complaint is, that it does not affirmatively show that the contract was awarded to the best bidder, after advertising to receive proposals therefor, or that there was any advertisement for proposals to do the work.

This objection is fatal. We have decided upon mature consideration that a contract for a street improvement is void unless there has been an advertisement for proposals to do the work. *McEwen v. Gilker*, 38 Ind. 233; *Moberry v. The City of Jeffersonville*, 38 Ind. 198.

We have adhered to the rulings in the above cases in several subsequent cases. The question should be regarded as settled.

The next objection urged to the complaint is, that it does

Brookbank v. The City of Jeffersonville, for the use of Sweeny *et al.*

not appear from said transcript or complaint that at any of the meetings of the common council of the city of Jeffersonville, mentioned in said complaint, a quorum of said common council was present, and that, therefore, it does not appear that any of the acts or proceedings in relation to the improvement of Maple street, set forth in said complaint, were the lawful acts or proceedings of said common council.

The precise question presented was involved and decided adversely to the appellee in the case of *Moberry v. The City of Jeffersonville, supra*. The objection is well taken.

The third objection to the complaint is, that it appears therefrom that a remonstrance was filed to the making of said improvement, after the adoption of the order directing the work to be done, and that such remonstrance does not constitute a part of the transcript.

It is insisted by appellant that such remonstrance was one of the "papers filed in the matter" within the meaning of section 71 of the act for the incorporation of cities, and should have been copied into the transcript, which stands as a complaint.

It is provided in said section, that the transcript or complaint, in such a case as this, shall contain "a true and complete copy of all papers connected in any way with the said street improvement, beginning with the order of the council directing the work to be done and contracted for, and including all notices, precepts, orders of council, bonds, and other papers filed in said matter." 3 Ind. Stat. 101.

In our opinion, the objection is untenable. We know of no law authorizing or permitting the filing of a remonstrance against the making of a street improvement. Such a remonstrance could not, therefore, be regarded as a paper filed in the matter. The council was not required to take any action upon such remonstrance. If a remonstrance can be filed at all, it is only advisory. The filing of it imposes no duty, and requires no action, on the part of the common council.

The court erred in overruling the demurrer to the complaint.

Brookbank v. The City of Jeffersonville, for the use of Sweeny et al.

The second error assigned is based upon the action of the court in overruling the motion for a new trial. The evidence is not in the record, and, consequently, the question sought to be raised is not before us.

The third error assigned is, that the court below erred in overruling the motion of appellant for a modification, both in form and substance, of the judgment rendered. This motion is made a part of the record by a bill of exceptions.

The first objection urged to the judgment is, that it provides that the sale of the property shall be by sale at auction "upon or near the said premises, or in the city court room of the said city of Jeffersonville."

The seventy-first section of the city charter provides, that "every such sale shall be by public auction, and upon or near the premises, or in the city court rooms of said city." 3 Ind. Stat. 105, sec. 71.

It is contended by counsel for appellant that section 71, so far as it attempts to regulate the practice in the court of common pleas in such cases as this, is a special law regulating the practice in courts of justice, and is in conflict with section 22 of article 4 of the constitution.

The learned counsel have not referred us to any adjudged case, nor have they furnished any argument in support of their position. We are not prepared to hold that such provision comes within the prohibition of section 22 of article 4 of our constitution. The law is not special, but is general so far as it relates to the sale of property for the payment of assessments for street improvements. It applies to all the cities that are governed by the general charter.

The second exception taken to the judgment is, that it provides for the payment of interest on the judgment, instead of on the assessment from the date of the estimate.

At the date of the judgment there was due upon the assessment the sum of one hundred and sixty-eight dollars and five cents of principal, and the sum of thirty-two dollars and ninety-five cents interest thereon from the date of the estimate. The judgment was rendered for the aggregate of the

Brookbank v. The City of Jeffersonville, for the use of Sweeny *et al.*

two sums, being two hundred and one dollars. The appellant claims that the judgment should have been for one hundred and sixty-eight dollars and five cents, with interest from the date of the estimate; in other words, that the court had no right to render judgment for the principal and interest due at the time of the rendition of such judgment, thus counting interest upon interest.

It is provided by section seventy-one of the city charter, that "the proceeds of any such sale [shall] be applied as follows, to wit: First, to the payment of such assessment, with interest thereon from the date of such estimates, and all costs accrued thereon by reason of said sale."

It is further provided in section seventy-one, that, "in case the court and jury shall find upon trial that the proceedings of said officers subsequent to said order directing the work to be done are regular, that a contract has been made, that the work has been done, in whole or in part, according to the contract, and that the estimate has been properly made thereon, then said court shall direct the said property to be sold and conveyed."

The court is required to find the above facts, and upon such finding, an order for the sale of the property is to be made. The court is not required to render a judgment for the amount found due, but when it finds that the estimate has been properly made, the finding shows the amount due upon such estimate.

Said section, as we have shown, provides for the application of the proceeds of such sale. The proceeds are to be applied, first, to the payment of the assessment, with interest thereon from the date of such estimates. The finding of the court should show the dates and amounts of the several estimates; and when these things are shown, the sheriff can compute the interest on such estimates to the time of the sale. We think the court erred in rendering a judgment for the principal of the estimates and the interest due thereon from the dates of such estimates, for by so doing the interest was compounded.

Isaacs v. Decker, Auditor, *et al.*

The last objection urged to the judgment is, that it provides for the payment of the costs of the action, when the statute only provides for the payment, out of the proceeds of such sale, of all costs accrued thereon by reason of such sale.

We think that the costs which accrue upon the appeal from the precept, except the cost of making the sale, should be adjudged personally against the losing party. The cost of making the sale is to be paid out of the proceeds of the sale of the property. See section seventy-one of city charter, 3 Ind. Stat. 101.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to sustain the demurrer to the complaint, and for further proceedings, in accordance with this opinion.

G. V. Hawk and W. W. Tuley, for appellant.

J. H. Stotsenburg and S. S. Johnson, for appellee.

ISAACS v. DECKER, AUDITOR, ET AL.

TAX.—*Lien of Poll and Personal*.—Real estate is liable for the poll tax and tax on personal property assessed against the owner thereof, although his title be extinguished afterward by the foreclosure of a mortgage thereon of older date than his purchase.

APPEAL from the Vanderburg Common Pleas.

WORDEN, J.—Complaint by the appellant against the appellees. Demurrer to the complaint sustained, exception, and final judgment for the defendants. We take the following statement of the appellant's case from his brief in the cause:

"Appellant brought this action, alleging that Albert C. Isaacs, being the owner of lot No. 6, in block No. 27, in the eastern enlargement of the city of Evansville, on the 19th

of April, 1866, with his wife, made and executed a mortgage on said lot to the State of Indiana, to secure the payment of a note dated 19th of April, 1866, and due 19th of April, 1871, for two hundred and thirty dollars of the funds belonging to town 6 south, and said mortgage was duly admitted to record in the proper office on the 16th of May, 1866.

"On the 9th of May, 1866, said Isaacs and wife made and executed another mortgage on said lot to J. M. Geupel to secure the payment of two notes executed by said Isaacs to Geupel for three hundred and seventy-five dollars each, dated April 1st, 1866; one of them due in two, and the other three years from date; and on the 16th day of May, 1866, said mortgage was duly admitted to record in the proper office.

"On the 8th day of October, 1866, by deed of that date, said Isaacs and wife sold and conveyed said lot No. 6 to John H. Scott, for and in consideration of the sum of one thousand nine hundred and eighty dollars, subject to said two mortgages, and the said John H. Scott, by the terms and stipulations of said deed to him, agreed to pay said mortgages to the State and Geupel, as part of the purchase-money recited above, and said deed was duly acknowledged and admitted to record in the proper office, October 18th, 1866.

"On the 24th of May, 1867, the said John H. Scott and wife mortgaged said lot to John Healy, to secure the payment of a note executed by Scott to Healy for the sum of five hundred dollars, dated May 24th, 1867, due one year after date, with interest from date, and on the 25th of May, 1867, said mortgage was duly admitted to record in the proper office.

"On the — day of —, 1871, said J. M. Geupel filed suit against said Isaacs and wife, Scott and wife, and John Healy to foreclose the mortgage to him, to which Healy filed his answer and cross complaint, setting up the mortgage from Scott and wife to him, and asked for a foreclosure.

Isaacs v. Decker, Auditor, et al.

of the same; and on the 4th of May, 1871, a judgment was rendered by the court foreclosing said mortgage and for a sale of a sufficiency of said lot No. 6 to satisfy and pay, first the claim of Geupel, then amounting to nine hundred and ninety-eight dollars and eighty-four cents, and nine dollars costs; and, second, the claim of John Healy, then amounting to six hundred and eighty dollars and seventy-seven cents; and in pursuance of said judgment said lot was sold by the sheriff under order of sale issued on said judgment; the sale was made on 3d day of June, 1871, and said Albert C. Isaacs became the purchaser of said lot at said sale at the sum of nine hundred dollars; said lot is not worth over one thousand dollars, the house on the same having been destroyed by fire.

“And on the 9th day of June, 1871, said Albert C. Isaacs paid off and discharged the said two-hundred-and-thirty-dollar note, to secure which the mortgage to State of Indiana was made; that said John H. Scott has wholly failed to pay either or any of the notes hereinbefore described; that for the years 1869, 1870, and 1871, said John H. Scott was assessed for taxes in Vanderburg county on said lot No. 6 and improvements; said taxes on said lot and improvements and penalty and costs on same amounting to the sum of forty-six dollars and twelve cents; that for the years 1869 and 1870 said Scott was assessed for taxes on his personalty and poll the taxes on said personalty and poll and penalty and costs on same amounting to one hundred and twenty-one dollars and ninety cents; that plaintiff, Albert C. Isaacs, has tendered to and offered to pay to said treasurer all the taxes, penalty, and cost on said lot No. 6 for the years 1869, 1870, and 1871, to wit, the said sum of forty-six dollars and twelve cents, and tenders the same in court, and which the said treasurer refused and still refuses to receive; and that said treasurer and auditor have advertised said lot for sale on the first Monday in February, 1872, or a sufficiency thereof to pay and satisfy said sum of one hundred and sixty-eight dollars and two cents, and will proceed to sell the same

Wesley et al. v. Milford.

unless prevented and restrained by order of court from so doing, and if so sold will produce great injury to plaintiff; and that there is no lien on said lot for the payment of any amount over and above the said sum of forty-six dollars and twelve cents.

"And prays for a restraining order and an injunction enjoining and restraining said auditor and treasurer from selling said lot for the payment of said sum of one hundred and twenty-one dollars and ninety cents; and that on a final hearing of the cause said injunction be made perpetual; and that plaintiff recover his costs; and for all necessary, general, and proper relief."

We are of opinion that the demurrer to the complaint was correctly sustained. The taxes that accrued against John H. Scott, for poll and personal property, whilst he was the owner of the lot, as well as the taxes upon the lot, were a lien upon the lot. This point was considered and decided in the case of *Bodertha v. Spencer*, 40 Ind. 353. We need not add anything upon this point to what was said in that case.

It is urged by counsel for appellant that, by his purchase under the mortgages, he acquired a right prior and superior to the lien for taxes which accrued after the property was transferred to Scott. We are of a different opinion.

The judgment below is affirmed, with costs.

S. R. Hornbrook and *H. R. Littell*, for appellant.

J. M. Warren and *H. A. Mattison*, for appellees.

WESLEY ET AL. v. MILFORD.

PRACTICE.—*Superior Court.*—*Appeal.*—*Assignment of Errors.*—Whatever errors are assigned on appeal from the superior court in general term to the Supreme Court must be predicated upon the assignment of errors in the general term and the action of that court in such term thereon.

SAME.—*Sufficiency of Complaint.*—Unless the question of the sufficiency of the

41	413
137	19

Wesley *et al.* v. Milford.

complaint has been raised in the general term, it cannot be assigned as error in the Supreme Court. PETTIT, C. J., and BUSKIRK, J., dissented.

SAME.—*Motion for New Trial.*—On such an appeal to the Supreme Court, the assignment as error of the overruling of a motion for a new trial, it was held, presented no question, as the court in general term did not overrule such motion.

SAME.—*Proper Assignment of Error.*—It is suggested that probably an assignment, that the superior court in general term erred in affirming or reversing the judgment of the court at special term, would present for the consideration of the Supreme Court on appeal all the questions that were properly presented to that court in general term.

APPEAL from the Marion Superior Court.

DOWNEY, J.—Suit by the appellee against the appellants to recover the value of a watch, chain, etc. The appellants were inn-keepers, and the appellee was a guest at the inn. It is alleged, in substance, in the complaint, that on the night of the 4th of October, 1871, the plaintiff was a guest in the hotel of the defendants, and that, by the direction of the defendants, he occupied a designated room in the inn; that, before retiring to his room, the servant of the defendants informed him that there were other gentlemen to occupy other beds in the same room, who, had not yet retired, and requested the plaintiff to leave the door of the room unlocked; that upon being so informed, the plaintiff placed in the care of the clerk of defendants his pocket-book, containing about three hundred dollars, and proposed to place in his care his watch, chain, etc., of the value of three hundred and ten dollars, when he was informed by the clerk that the parties occupying the room were honest men, and that there would be no danger in taking said watch, chain, etc., to his room; that he then took the same with him, and upon retiring, deposited them under the head of his bed, leaving the door unlocked; that during the night, while he was asleep, the watch, chain, etc., were stolen, through the negligence of the defendants, and of their servants, in requiring the door of the room to be left unlocked, etc.

The defendants answered by a general denial. There was a trial by jury, at special term, resulting in a verdict for the plaintiff. The defendants moved the court to grant them a

new trial, which motion was overruled, and there was final judgment for the plaintiff for the amount of the verdict.

The defendants then appealed from the special to the general term, where they assigned for error the overruling of the motion for a new trial. Upon the hearing in the general term, the judgment of the special term was, in all things, affirmed, and from this judgment they appealed to this court.

In this court it is assigned for error, that the complaint does not state facts sufficient to constitute a cause of action, and that the court erred in overruling the appellants' motion for a new trial.

Some questions of practice of considerable interest arise in this case. The law establishing the superior court makes it to consist of three judges. It provides for general and special terms. The general terms are held by all the judges, or, in some cases, as when one of them is disqualified, by a majority of them. In general terms, the judges distribute the business to the special terms, and each judge may hold a special term, and try and dispose of the business distributed to him, having power to call one or both of the other judges to sit with him in special term. By section twenty-five of the act, it is provided, that in all cases where, under existing or future laws of this State, a person has the right of appeal from the circuit court to the Supreme Court, an appeal may be had from a special term to the general term of said superior court; that the appeal shall be heard and considered in the general term upon the original papers and records filed and made in the cause at special term, and such matters as are properly made part thereof by bills of exceptions; it may affirm or reverse the judgment of the special term, or modify it, or render such judgment as may be proper. It shall, if the judgment of the special term is not affirmed, enter of record the error or errors found therein, and remand said cause to the special term, with instructions as to said error or errors; and the special term shall carry into effect the instructions of the general term.

Wesley *et al.* v. Milford.

No appeal is authorized by the act from the judgment of a special term directly to this court. But by section twenty-seven of the act it is provided, that any party may appeal to this court from the order or judgment of general term in any case when, by existing or future laws of this State, an appeal may be had from an order or judgment of the circuit court; and also when a party has had a judgment in his favor in a special term, and it is reversed or modified by the general term upon appeal to it. The appeal from the general term to the Supreme Court shall be regulated by the law regulating appeals from the circuit court to the Supreme Court, so far as applicable. Acts 1871, p. 48, *et seq.*

The appeal to this court being allowed from the judgment of the general term only, we think it must follow that whatever errors are assigned in this court must be predicated upon the assignment of errors in the general term, and the action of that court in general term thereon. It is proper that the whole record shall come to this court on appeal, but the question here is, whether that court, in general term, erred or not. If an error of the special term has not been assigned in the general term, it cannot be presented to this court for the first time. It was, no doubt, the intention of the legislature, in providing for an appeal from the special to the general term, and in allowing an appeal from the general term only to this court, to limit this court to an examination of the rulings of that court in general term. While we must look to the rulings of that court in special term in deciding upon its action in general term, this is only for the purpose of enabling us properly to pass upon the alleged errors of the court in general term. It could not have been intended that cases appealed from that court to this should be presented to this court as though they had never been passed upon by that court in general term. With a bench of three learned and careful judges, having powers, on appeal, to reconsider questions decided by its members when sitting alone, and to correct such errors as will unavoidably occur, it was expected that many cases, which would other-

wise have been appealed to this court, would be disposed of to the satisfaction of the parties in the general terms of that court.

If we are right in these views, the errors assigned in this case can be easily disposed of. The first error questions the sufficiency of the complaint. It is conceded by counsel for the appellant, and it is shown by the record, that this question was not presented to the general term as one of the errors of which complaint was there made. It is presented here for the first time. Counsel claim that this is one of the questions which may be assigned as error without having been in any way presented in the court below, and they refer us to *Livesey v. Livesey*, 30 Ind. 398. That, however, was an appeal from the circuit court to this court, and does not touch the question under consideration. In the general term of the superior court, this question could, no doubt, have been presented, although it was not presented or raised in any way in the special term. But not so, we think, on an appeal from the general term to this court. It is depriving a party of no right by holding that he must present the errors of the special term of which he complains to the general term. This he can do there as fully as he could do in this court if he was appealing from a circuit court to this court.

The other error mentioned is the overruling of the appellants' motion for a new trial. This alleged error relates to the action of the special term, and is not an assignment of an error committed by the general term, and consequently does not present any question for our decision. While we need not decide, and do not decide, what would be a proper form for an assignment of errors in such a case, it may be suggested that probably an assignment that the superior court, in general term, erred in affirming or reversing the judgment of that court at special term, would present for the consideration of this court all the questions which were properly presented to that court.

Ex Parte Skeen.

The judgment in this case is affirmed, with costs.

PETTIT, C. J., and BUSKIRK, J., dissent from so much of the foregoing opinion as holds that the insufficiency of the complaint cannot be assigned for error in this court, when it was not assigned for error in the general term of the superior court.

M. M. Ray, G. H. Voss, B. F. Davis, and J. A. Holman,
for appellants.

EX PARTE SKEEN.

CRIMINAL LAW.—*Change of Venue.*—*Practice.*—Where a change of venue in a criminal case is taken from a circuit judge on the ground of his supposed prejudice, he may call any other circuit judge or common pleas judge to hold the circuit court and try such cause, either at the pending term or a succeeding regular or adjourned term; but the judge possesses no power to set such cause down for trial during vacation.

APPEAL from the Judge of the Ripley Circuit Court.

BUSKIRK, J.—The appellant was, at the February term, 1871, of the Ripley Circuit Court, indicted for seduction. At the August term, 1871, of said court, the appellant moved the court for a change of venue from the judge of said court on account of the bias and prejudice of the said judge toward him. The motion was granted, and the cause was set down for hearing at the court-house in Versailles, Ripley county, Indiana, at a special term of the court, to begin on the 5th day of December, A. D. 1871, before the Honorable William A. Moore, judge of the twenty-second judicial district.

At the time and place named, Judge Moore appeared and opened court. The court was then adjourned to the 18th day of December, 1871. On the 18th of December, 1871, the court met and adjourned to the second Monday in Jan-

uary, 1872. At the time named, the court met, when the appellant moved to quash the indictment. The motion was overruled, and an exception was taken. The appellant then, upon affidavit, moved to continue the cause. The motion was granted, and the case was set down for hearing on the fourth Monday in May, 1872. At the time named, the court met and adjourned from day to day, until the 10th day of June, 1872, on which day the appellant again applied for and obtained a continuance of the cause until the 26th day of November, 1872.

The court met on the 26th day of November, 1872, when the trial of the cause was commenced before a jury, and continued from day to day, until it was completed. The jury found the appellant guilty, and fixed his punishment at imprisonment in the county jail for the period of four months.

The appellant moved the court for a new trial, and in arrest of judgment, which motions were overruled, and exceptions were taken. The appellant not being personally present in court, he and his sureties were, upon the motion of the prosecuting attorney, three times solemnly called, and he failing to answer, his recognizance was forfeited. Thereupon, the prosecuting attorney moved the court for a warrant for the arrest of the said appellant. The court ordered the warrant, and made the same returnable at the next regular term of said court, and the court increased the bail from five to fifteen hundred dollars. The court did not render any judgment on the verdict. On the 9th day of December, 1872, the court adjourned to the court in course.

The appellant was, by virtue of such warrant, arrested and placed in the jail of said county. On the 10th day of January, 1873, the appellant filed his petition, reciting the foregoing facts, and asked for a writ of *habeas corpus*. The petitioner, in his said petition, claims that his imprisonment was illegal and unlawful for the following reasons:

First. That there was no authority for holding the special term of said court, at which he was tried.

Second. That no notice was given, as required by law, for the holding of said special term of said court.

Third. That there was no authority for continuing said special term over and beyond the regular term of the Ripley Circuit Court.

Fourth. There was no authority for issuing the warrant upon which he was arrested and is now held in custody.

Fifth. That a change of venue having been granted from the regular judge of the circuit court, if the court in which he was tried was legal, then the judge who presided at such trial had exclusive jurisdiction of the case, and consequently had no power to issue a warrant and make it returnable to the regular term of the circuit court.

The judge refused to order a writ of *habeas corpus*, to which ruling the appellant excepted, and prosecutes his appeal to obtain a reversal thereof.

The important question in the case is, whether the court in which the appellant was tried possessed jurisdiction of the case, the solution of which depends upon whether the Ripley Circuit Court possessed the power, upon granting a change of venue, as to the judge, to set the case down before the judge called to preside, for trial in vacation.

The statute in relation to the granting of a change of venue in a criminal case is as follows:

"Sec. 75. Every criminal action must be tried in the county where instituted, except when otherwise provided in this act.

"Sec. 76. The defendant may show to the court by affidavit that he believes he cannot receive a fair trial, owing to the prejudice of the judge, or to excitement or prejudice against the defendant in the county, or some part thereof, and demand to be tried by disinterested triers." 2 G. & H. 406.

Section 77 of the criminal code, as amended by the act of December 20th, 1865, reads as follows:

"Sec. 77. When the objection is to the judge, in an action pending in the court of common pleas, the action may

Ex Parte Skeen.

be transferred to the circuit court of the county, and tried therein. When the objection is to the judge of the circuit court, any other circuit judge, or judge of the common pleas, may hold the court and try the cause." See acts of special session of 1865, page 158.

When the appellant filed his affidavit, alleging that he believed he could not obtain a fair trial, owing to the prejudice of the judge, such judge was imperatively required to grant the change of venue. The judge possessed no discretion in the premises. He was authorized to call any other circuit judge, or judge of the common pleas court, to hold the circuit court and try such cause either at that or a succeeding regular or adjourned term, which is regarded as a part of the regular term of such court, but the judge possessed no power to set such cause down for trial in vacation.

We have been referred to the first and second sections of the act approved March 1st, 1855, as authorizing the setting down for trial a cause in vacation, which reads as follows:

"Sec. 1. That whenever any judge of a circuit court shall have a pecuniary interest in, be a party to, or be related by kindred or marriage, or may have been of counsel to any party in any cause pending in the circuit court of any county of which he may be judge, it shall be lawful for such judge, in his discretion, to decline presiding during the trial of such cause, and if either party object to his presiding therein, he shall be deemed incompetent to preside during such trial.

"Sec. 2. Whenever any judge shall have declined, or may have been rendered incompetent to preside in any cause, for any of the causes mentioned in the preceding section, he shall appoint a time during the vacation of such court for the trial of such cause, and give at least ten days notice thereof to some other judge of a court of record, or if the parties litigant shall so desire, to some practising attorney of said court, mutually agreed upon by said litigants, and said judge or attorney so notified, shall, at the time designated by such disqualified judge, attend at the usual place of holding courts in such county, and preside in said cause,

Ex Parte Skeen.

and dispose of the same, subject to all the rules and regulations governing circuit courts in similar cases, with power to adjourn from time to time, until the business is disposed of." 2 G. & H. 9.

This court, in *Barnes v. The State*, 28 Ind. 82, held that the above act was general in its provisions, and embraced both criminal and civil actions.

In our opinion, the above act has no application to a case like the present, where there was a change of venue from the judge on account of his prejudice. The above act embraces four classes of cases.

First. Where the judge has a pecuniary interest in any cause pending in his court.

Second. Where the judge is a party to an action in his court.

Third. Where the judge is related by kindred or marriage to a party to an action in his court.

Fourth. Where the judge may have been of counsel to any party in any cause pending in his court.

The present case is not embraced by any of the above classes. We have been unable, after diligent search, to find any statute that authorizes the judge of a circuit court, upon a change of venue from the judge on account of his prejudice, to set the cause down for trial during the vacation of such court.

It necessarily and unavoidably results that Judge Moore, who was called by the judge of the circuit court to preside at the trial of the appellant, during the vacation of the circuit court, acquired no jurisdiction of the cause, and consequently all the proceedings had before, and all the orders entered by, him were absolutely void. The order of the circuit court granting the change of venue was valid, but the order setting the case down for trial during the vacation of such court, and all proceedings had before Judge Moore, were unauthorized and void.

The judge of the circuit court erred in refusing to grant the writ of *habeas corpus*. He should have issued the

Swingle v. The Bank of the State of Indiana.

writ and inquired into the cause of his caption and detention, and discharged, remanded, or held to bail, as might be deemed proper.

The judgment of the judge of the Ripley Circuit Court is reversed; and the cause is remanded, with directions to the said judge to order the writ, and for further proceedings in accordance with this opinion. The clerk is directed to certify this opinion immediately.

M. K. Rosebrugh, J. W. Gordon, and J. Skeen, for appellant.

J. C. Denny, Attorney General, for the State.

SWINGLE v. THE BANK OF THE STATE OF INDIANA.

PRACTICE.—Bond of Indemnity.—The statute does not authorize the court to require a bond of indemnity to be given by a plaintiff, as assignee of a deposit in a bank, where no certificate of deposit has been given, and the depositor cannot be found, and publication has been made of notice to the depositor, made a co-defendant with the bank to answer as to his interest.

Query.—Is this a proper case for publication?

SAME.—Costs.—New Trial.—The court, upon granting a new trial, should make the proper order as to accrued costs, considering the reasons for granting the new trial. The order should not relate to future costs.

APPEAL from the Marion Common Pleas.

DOWNEY, J.—Lawrence Scott deposited in said bank a sum of money, taking no certificate of deposit. Afterward he transferred his right to the money to the plaintiff herein, the said Swingle. Swingle sued the bank, making Scott a defendant, to answer as to his interest. Upon an affidavit of the plaintiff, stating that he had made diligent search and inquiry, to ascertain the residence of said Scott, but without avail, and that the residence of said Scott was unknown to him, publication was made as to him, and he was thereupon defaulted. See 3 Ind. Stat. 360.

The bank appeared, and answered by a general denial, and

41	420
156	6

by alleging that Scott had died before the suit was brought, and that his personal representatives were necessary parties to the suit. There was a reply by general denial. The court, by agreement of the parties, tried the cause, and found for the plaintiff, but found also that the bank was entitled to a bond of indemnity before the plaintiff could have execution. On the plaintiff's motion, a new trial was granted by the court, "without making any order as to future costs," as the bill of exceptions states. Upon the second trial, there was what may be regarded as a general finding for the plaintiff, on which the court rendered judgment requiring the plaintiff to execute a bond in the sum of seven hundred dollars to the bank, to indemnify the bank from any claim to the money, which might be set up by Scott, or his representatives, heirs, creditors, or assigns; and upon filing the said bond, approved by the court, that he recover of the bank the said sum of three hundred and fifty dollars, and his costs and charges up to and including the first judgment, and that the bank recover the costs by it expended, occasioned by the new trial.

The questions discussed relate to the correctness of the action of the court in requiring the plaintiff to execute the indemnifying bond, and to pay the costs of the last trial.

We doubt whether this is a case in which notice by publication could be given, but as no question was made as to this in the court below, we make none.

We are of the opinion that the court erred in requiring the execution of the bond of indemnity. Counsel for the appellee refer us to 2 G. & H. 153, sec. 202. But that section applies to cases where it is admitted by the pleadings or examination of the party that he has in his possession, or under his control, money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs, or is due to, another party. In such a case the court may, according to that section, order the same to be deposited in court, or delivered to such party, with or without security, subject to

the further direction of the court. We think it quite clear that the case under consideration does not come within this section of the code. There was no admission in the pleading or examination of the defendant, as contemplated by this section. On the contrary, the defendant pleaded a general denial, and there was no examination of the party. Beside this, the section seems not to contemplate the making of such an order on the final hearing, as the deposit in court of the money or thing in controversy is to be made subject to the further order of the court.

With reference to the question relating to the costs, it is provided, that the court may allow a new trial at the costs of the party applying therefor, or on the costs abiding the event of the suit, or a portion of the costs, as the justice and equity of the case may require, taking into consideration the causes which may make such new trial necessary. 2 G. & H. 214, last division of sec. 352.

The written motion on which the court granted the new trial assigned as grounds therefor the insufficiency of the evidence; that the finding was contrary to law; that the conclusions of law upon the facts were contrary to law; and because the order of the court requiring the bond of indemnity was unauthorized. For which of the reasons the new trial was granted, is not made to appear. The court, at the time of granting the new trial, made no order for the payment of any of the costs, but when the case was again tried, and judgment rendered, required the plaintiff to pay, not the costs that had accrued to the time of granting the new trial, or any part of them, but all the costs that accrued after the granting of the new trial. In our opinion, this was not correct. The order which the court is authorized to make, on granting a new trial, relates to the costs that have already accrued in the cause, and not to those which may afterward accrue, and we think that the court should make the order as to the costs at the time of granting the new trial. In making the order for payment of costs, or granting the new trial without their payment, the court is to "take into

Brooker v. Weber.

consideration the causes which may make such new trial necessary." The court is not to make the question depend upon the result of the second trial, but upon the reasons which control it in granting the new trial.

As the plaintiff succeeded in the case on the final trial, and no order had been made on granting the new trial requiring him to pay any costs, he was entitled to recover full costs. 2 G. & H. 225, sec. 396.

The judgment, so far as it requires the appellant to execute the bond of indemnity, and so far as it requires him to pay any costs to the appellee, is reversed, with costs; and the court is instructed to render judgment that he recover full costs.

C. Hamlin and D. V. Burns, for appellant.

F. Rand and R. H. Hall, for appellee.

BROOKER v. WEBER.

PRACTICE.—Interrogatory to Jury.—Objection.—Waiver.—An objection to the propounding of an interrogatory to a jury must be made when the interrogatory is submitted, that the court may modify or refuse the same; if the objection is withheld until the interrogatory is answered, it will be too late to be available.

SAME.—Reasons for New Trial.—Indefinite.—A statement of a reason for a new trial, "that the court misdirected the jury," does not include a refusal to direct the jury as requested; and the statement is too vague and indefinite.

APPEAL from the Marion Circuit Court.

WORDEN, J.—Action by the appellee against the appellant for the breach of the covenant against incumbrances in a deed for certain real estate executed by the defendant to the plaintiff. It appears, by averments in the complaint, that the defendant executed to the plaintiff a conveyance of certain real estate, for the consideration of thirteen hundred dollars, as expressed in the deed, and that the property was encumbered by a mortgage executed by one Mathew

B. Tilberry to McKernan, Pierce, and Yandes, which mortgage has been foreclosed, the property sold, and the plaintiff evicted therefrom. It is averred that the plaintiff did not undertake or assume to pay the mortgage as part of the purchase-money.

The defendant answered in two paragraphs.

First. That the whole amount of the purchase-money agreed to be paid for the property was only one thousand dollars, and that only five hundred dollars was paid at the time of the execution of the deed, leaving five hundred dollars, which still remains due and unpaid; that in consideration thereof, the plaintiff agreed with the defendant to pay and satisfy the mortgage, and that the amount, when paid, should be credited on the indebtedness of the plaintiff for the remaining purchase-money; and that the plaintiff, though duly notified, suffered the decree of foreclosure, sale of the property, and the eviction.

Second. That five hundred dollars of the purchase-money was not paid at the time of the execution of the deed, nor has it yet been paid; that the plaintiff executed his notes for the same to the defendant, and a mortgage to secure the payment thereof; that the defendant assigned the notes and mortgage to one Lewis W. Hasselman; that before any breach of the covenant, a large amount of the notes being due and unpaid, to wit, more than sufficient to pay off and discharge the mortgage, the plaintiff agreed with the defendant and said Hasselman that he would pay off and satisfy the mortgage, and that he should be credited on the notes with the amount so to be paid in satisfaction of the mortgage; that the plaintiff failed and neglected to pay the mortgage, hence the same was foreclosed, and the plaintiff was evicted from the premises; that the plaintiff has not paid the five hundred dollars, or any part thereof, though the same has been long due and payable.

Reply in denial, trial by jury, verdict and judgment for the plaintiff for the sum of eight hundred and forty-five dollars and six cents.

Brooker v. Weber.

In addition to the general verdict, the following interrogatories were propounded to, and answered by, the jury.

"First. Did the plaintiff, at the time of the execution of the deed from Brooker to him, assume the Tilberry mortgage? Ans. No.

"Second. Did the parties to this suit, or the plaintiff and Hasselman, agree that the plaintiff should pay the Tilberry mortgage and be credited therefor on the outstanding notes of Weber? Ans. No.

"Third. What was the consideration of the deed from Brooker to Weber? Ans. Thirteen hundred dollars.

"Fourth. Was that consideration paid by Weber? If not all, how much was paid? Ans. Seven hundred and forty-eight dollars."

The defendant moved for a new trial for the following reasons:

"1st. Because the verdict is contrary to law.

"2d. Because the verdict is contrary to the evidence.

"3d. Because the court misdirected the jury.

"4th. Because the damages assessed by the jury are excessive and not justified by the evidence.

"5th. Because the second interrogatory did not present a single material fact involved in the issues, but was double, and calculated to mislead the jury looking to the instructions of the court."

The motion was overruled, and the defendant excepted.

The errors assigned are, "first, the court erred in submitting the second interrogatory to the jury; second, the court erred in submitting the fourth interrogatory to the jury; third, the court erred in refusing to give the first, second, and third instructions asked by the defendant; fourth, the court erred in giving, on his own motion, the instruction to the jury set out in the bill of exceptions; fifth, the court erred in overruling the defendant's motion for a new trial."

Taking up the assignments of error in their order, we may observe that no objection was made to the interrogatories at the time they were propounded to the jury, nor until the

motion for a new trial was made. Indeed, it does not appear at whose instance they were propounded. But assuming that they were propounded at the instance of the plaintiff, it is quite clear that the defendant, had he thought them defective, should have made his objection at the time they were propounded to the jury, so that if objectionable they might have been modified and the objectionable features obviated. By withholding objection until the interrogatories had been propounded to and answered by the jury, the objection was clearly waived.

There is nothing in the first and second assignments of error.

The third assignment raises no question for our consideration, because the motion for a new trial was not based upon the refusal of the court to give charges. One of the grounds for a new trial was, that the court misdirected the jury. This does not embrace the refusal of the court to direct as asked.

The fourth assignment has no sufficient foundation in the motion for a new trial to support it. The reasons for a new trial allege that "the court misdirected the jury." In what particular, or in what charge, the misdirection was supposed to consist was not pointed out, or in any manner designated. A bill of exceptions sets out a charge which was given, and it states that "other instructions were given by the court, but none were given inconsistent with, or modifying the above." Whether the misdirection was supposed to be contained in the charge set out in the bill of exceptions, or in the other charges which were given, but not contained in the bill of exceptions, does not appear. The authorities are quite numerous that the motion for a new trial is too vague and indefinite to raise any question as to the charges given.

The fifth and last assignment of error raises no question not already considered. The evidence is not in the record. The bill of exceptions states that evidence was offered tending to prove certain facts, for the purpose of showing, as we suppose, the applicability of certain charges which were

Drook v. Irvine.

asked. But the bill of exceptions does not purport to contain all the evidence, nor does it show what facts were proved or disproved. There is no error in the record; wherefore the judgment must be affirmed.

The judgment below is affirmed, with costs and five per cent. damages.

C. H. Test, D. V. Burns, and G. S. Wright, for appellant.

M. M. Ray, G. H. Voss, B. F. Davis, and J. A. Holman, for appellee.

DROOK v. IRVINE.

PLEADING.—*Copy of Written Contract.*—*Demurrer to Reply to Bad Answer.*

Suit on a promissory note, secured by a chattel mortgage upon a portable saw-mill. Answer that the note was given in consideration of the sale of the portable saw-mill, which sale was made upon a written agreement, executed by the plaintiff to the defendant, warranting the mill to be in good and complete running order; that there was a breach of said warranty, etc. There was no copy of the written contract filed with the answer. To this there was a reply, that the written contract was simply preliminary to an examination of the mill by the defendant, and that such examination had been made, and the note thereupon executed, and the written contract surrendered up. A demurrer to this reply was overruled.

Held, that the reply was good, and that if bad the demurrer should have been sustained to the answer for the failure to file therewith a copy of the written agreement.

APPEAL from the Grant Common Pleas.

OSBORN, J.—This was an action instituted in the court of common pleas of Grant county, by the appellee against the appellant, upon a promissory note and to foreclose a chattel mortgage upon a portable saw-mill in that county. The appellant answered that the note and mortgage were given in consideration of the sale to him, by the appellee, of the mill mentioned in the mortgage; that the appellee, at the time, entered into a written agreement, by which he warranted,

amongst other things, that the mill so sold was in good and complete running order, with all the fixtures and appurtenances belonging to it. He also averred that the mill was not in good running order, and states wherein it was out of order, the particulars of which it is not necessary to state here, in order to understand the question to be decided. No copy of the written contract was filed with the answer. To that answer the appellee replied in two paragraphs, the general denial, and one in which it is stated that the appellee, a few days before the making of the contract mentioned in the answer, verbally sold the mill to the appellant, and entered into the contract for the purpose of binding the parties until they should test the mill and execute the note and mortgage and other writings therewith connected; that afterward they met, examined, and tested the mill, and thereupon the appellant, being fully satisfied with the mill, executed said papers, and accepted the mill in satisfaction of the written contract, and surrendered the same to the appellee for cancellation. A demurrer was filed to the replication, which was overruled, and duly excepted to.

The cause was tried by the court, finding for the appellee, motion for a new trial overruled, exception, and judgment on the finding.

The errors assigned are, first, overruling demurrer to second paragraph of reply; second, overruling the motion for a new trial; third, rendering judgment of foreclosure.

The demurrer to the reply ought to have been sustained to the answer, because no copy of the written contract was filed with it. 14 Ind. 19; 14 Ind. 311; 14 Ind. 131; 13 Ind. 58; 13 Ind. 61; 13 Ind. 146. And although the replication might be bad, still there would be no available error in favor of the appellant in this case, for the reason that it is not error to overrule a demurrer to a bad reply to a bad answer. 15 Ind. 169; 35 Ind. 304. But we see no objection to the reply in this case. The evidence is not before us, and we cannot therefore decide upon the question of the new trial. If the appellant desired this court to pass upon the evidence

Bowers, Adm'r, v. Van Winkle.

and decide upon its sufficiency to sustain the finding, he should have set it out in a bill of exceptions. That he failed to do.

The last error assigned is, in rendering judgment of foreclosure. No error is pointed out by the appellant, and we have not been able to find any. The foreclosure was a part of the remedy prayed in the complaint. On the trial, the court found generally for the appellee, and he was entitled to a judgment of foreclosure on the complaint and finding.

The judgment of the said common pleas court of Grant county is affirmed, with five per cent. damages and costs.

A. Steele, R. T. St. John, J. Brownlee, and H. Brownlee, for appellant.

J. Van Devanter and J. F. McDowell, for appellee.

41	432
142	239
41	433
146	403

BOWERS, ADMINISTRATOR, v. VAN WINKLE.

MARRIED WOMAN.—*Subsequent Marriage.—Prohibition of Alienation.*—A married woman is prohibited from alienating, whether for life or in fee, absolutely or contingently, any real estate which she has acquired by virtue of a previous marriage, and it is immaterial whether there be children by such previous marriage or not; and a mortgage of such real estate is within the prohibition of the statute.

EVIDENCE.—*Record of Deed.*—A record of a deed is proper evidence, and neither the original deed nor a certified copy thereof is required.

MARRIAGE.—*Proof.*—In civil suits, except for criminal conversation, cohabitation and reputation are sufficient evidence of marriage.

APPEAL from the Henry Circuit Court.

BUSKIRK, J.—This action was brought by the appellant against the appellee and her husband, Robert R. Van Winkle, upon a note and mortgage, for the purpose of obtaining a judgment on the note against the husband, and a foreclosure of the mortgage as to both defendants.

Bowers, Adm'r, v. Van Winkle.

The husband made no appearance and was defaulted, and judgment was taken against him for the amount of the note. The appellee, Mrs. Van Winkle, appeared and answered as follows:

"Delila Van Winkle, defendant herein, for separate answer to plaintiff's complaint, says that the note sued on was executed and given for a debt then owing by her husband, her codefendant, and that she signed said note as security for her said husband, and for no other purpose whatever. And as to said mortgage, said defendant says that she is the owner of the real estate described therein, by virtue of her marriage with one William M. Yost, who has since deceased, leaving as his heirs said defendant and four children, the fruits of said marriage of defendant and said Yost; that said children are all now living; that, after the decease of her said first husband, the defendant intermarried with her codefendant, and that during such second marriage said mortgage was executed; wherefore she demands judgment."

The plaintiff demurred to the answer. The demurrer was overruled, and an exception taken. The plaintiff replied in denial of the answer. The cause was, by the agreement of the parties, submitted to the court for trial, and resulted in a finding for the defendant. The court, over a motion for a new trial, rendered final judgment on the finding.

The plaintiff has appealed, and assigns for error the overruling of the demurrer to the answer, and the motion for a new trial.

Did the answer constitute a bar to the action? In our opinion, it was a complete bar to the action. When the note was executed, the appellee was a married woman, and she signed the note as the surety of her husband.

Our statutes have not changed the rule of the common law, that a married woman is incapable of entering into, or binding herself by, an executory contract. Any such contract made by her, whether written or verbal, is absolutely void, where the contract does not relate to her separate

Bowers, Adm'r, v. Van Winkle.

estate. The note sued upon created no legal personal liability against her, and there could be no recovery thereon. While the note of a married woman creates no personal liability against her, she may, by joining with her husband, mortgage any lands which she is not prohibited by the statute from alienating. *Coats v. McKee*, 26 Ind. 223; *Stevens v. Parish*, 29 Ind. 260; *O'Daily v. Morris*, 31 Ind. 111; *Armstrong v. Nichols*, 32 Ind. 408; *Johnson v. Tutewiler*, 35 Ind. 353; *Higgins v. Willis*, 35 Ind. 371.

It is insisted by the appellee that, as she acquired the land mortgaged by descent from her former husband, she could not alienate such real estate, during her second marriage.

It is maintained by the appellant that, while the appellee could not convey away the fee simple of such real estate, she had the right to mortgage the same, and that the purchaser at the sale, upon foreclosure, would acquire an estate for the life of the appellee, in such lands. The precise question involved in this case was involved in the case of *Vinnedge v. Shaffer*, 35 Ind. 341, and was decided adversely to the appellant.

In that case it was held, that a woman, during a second or subsequent marriage, was prohibited, both by the letter and spirit of the statute, from alienating, whether for life or in fee, absolutely or contingently, any real estate which she had acquired by virtue of a previous marriage; and that a mortgage is, in some sense, an alienation, and fairly within the prohibition of the statute. The ruling in the above case is decisive of the case in judgment. The court committed no error in overruling the demurrer to the answer.

We are next to inquire whether the court erred in overruling the motion for a new trial. It is claimed that the court erred in admitting in evidence the record containing a deed, where either the original deed or a certified copy of the record should have been produced. There is nothing in the objection. It is expressly provided, by section 283 of the code, 2 G. & H. 183, that "records of deeds or other instruments" are admissible in evidence. It is also

Bowers, Adm'r, v. Van Winkle.

provided, as a matter of convenience, that "exemplifications or copies of records" are admissible in evidence. It has been repeatedly held by this court, that the records of deeds, or other instruments, are admissible in evidence. *Lyon v. Perry*, 14 Ind. 515; *Rush's Adm'r v. The State*, 20 Ind. 432; *Vail v. McKernan*, 21 Ind. 421; *Wells v. The State*, 22 Ind. 241; *Winship v. Clendenning*, 24 Ind. 439.

The court, over the objection and exception of the appellant, permitted the appellee to prove, by two witnesses, that she was the widow of William M. Yost, and the wife of her codefendant, and this ruling is assigned for error.

It is insisted that the marriage of the appellee could only be proved by the record.

In our opinion, the objection is untenable. It is a general rule that in civil suits, except for criminal conversation, cohabitation and reputation are sufficient evidence of marriage. *Fleming v. Fleming*, 8 Blackf. 234; *Trimble v. Trimble*, 2 Ind. 76, and the authorities there cited.

It is next urged that the court erred in permitting the appellee to prove, by mere hearsay evidence, that she had children by her former marriage. Conceding that such evidence was incompetent, it did the appellant no injury, as the evidence was wholly irrelevant and immaterial. It was said by this court, in *Vinnedge v. Shaffer*, *supra*, that "the restraint upon alienation, by the terms of the statute, is as absolute where there are no children of the marriage in virtue of which she received the property, as where there are."

Finally, it is argued that the finding is not supported by the evidence. We think otherwise. The finding was fully sustained by the evidence.

There was no error in overruling the motion for a new trial.

The judgment is affirmed, with costs.

J. Brown and R. L. Polk, for appellant.

W. H. Carroll, for appellee.

Wallace, Adm'r, v. Brown *et al.*

WALLACE, ADMINISTRATOR, v. BROWN ET AL.

41	436
149	559

GUARDIAN'S SALE.—*Fraudulent Purchaser.*—If a guardian sell the real estate of his ward, by order of the proper court, all the proceedings being formal and regular, and receive his own individual notes in payment, and fail to account to the proper court for the proceeds of the sale, the purchaser may be held accountable for the trust property, or its proceeds if sold by him to an innocent purchaser.

APPEAL from the Marion Civil Circuit Court.

DOWNEY, J.—This was an action brought by the appellees against the appellant's intestate, Robert L. Walpole, and one Furgason, to recover the value of certain real estate. Two of the plaintiffs are the heirs of one Michael, and the other two their husbands. Furgason was the guardian of the two female plaintiffs while they were unmarried and minors, and as such had sold the said real estate by order of the common pleas of Marion county, and Walpole had become the purchaser thereof at such sale, and had sold the same to an innocent purchaser. The right to recover was based on an allegation that the sale of the land to Walpole was fraudulent. During the pendency of the action, Walpole departed this life, and his administrator was made a party as the representative of his personal estate. A demurrer to the complaint by the appellant was overruled, and he excepted. The appellant answered, first, a general denial; and, second, setting up the proceedings in the common pleas for the sale of the land, alleging payment of the purchase-money, making a copy of the record part of the answer, and alleging that Furgason, the guardian, fully accounted for the proceeds of the sale to the common pleas. In the reply, the plaintiffs alleged that Walpole paid no money to the guardian for the land, but that he paid for it by surrendering to him the notes of the guardian for his own debt, which notes were given without consideration; that but for the fact that Walpole was urging the payment of the notes, Furgason would not have applied for the order or sold the land, and that there was no necessity for a sale of the land. There was also in the reply a general denial of the

answer. Furgason made default. There was a trial by the court of the issues as to the administrator of Walpole, and a finding for the plaintiffs against him. He made a motion for a new trial which was overruled, and he excepted. Final judgment was then rendered for the plaintiffs. The evidence is properly in the record.

The errors assigned involve the correctness of the ruling of the court in overruling the demurrer to the complaint, and in refusing to grant a new trial.

No objection to the complaint is pointed out or urged in the brief of counsel for the appellant, and we think, from the examination made by us, that it is sufficient.

We regard the evidence admitted by the court as to the want of consideration for the notes of Furgason to Walpole, which were surrendered by Walpole in payment for the land, as simply immaterial. The only question involved in the case is, whether if a guardian sell the real estate of his ward, by order of the proper court, all the proceedings being formal and regular, and receive his own notes in payment, and fail to account to the proper court for the proceeds of the sale, the sale can for that reason be treated as void, and the purchaser be held accountable for the trust property or its proceeds, if sold by him to an innocent purchaser.

The record of the proceedings by the guardian in making the sale shows all the steps required by the statute to have been taken, and his report states that the purchase-money was paid. It appears probable, however, from his evidence on the trial, that if the money was paid to him it was only to enable him to report the fact of payment, and that he immediately returned it to Walpole. The record given in evidence shows a final report by the guardian as to one of his wards, and payment to her and others of fifty-six dollars. There is nothing shown as to any further accounting for the proceeds of the sale, which amounted to three hundred and sixty-six dollars and sixty-seven cents. Counsel for the appellant argues the case as though there had been an accounting for all the purchase-money by the guardian. But

Ward *et al.* v. Patrick.

the record does not show this, and hence we need not decide what might be the law applicable in such a case. We think under the facts shown in this case the sale cannot be regarded otherwise than as fraudulent and void. One who knowingly receives from a trustee the trust money or property in satisfaction of the individual debt of the trustee to him, must be regarded as participating in the fraudulent diversion of the property, and liable to the beneficiary in the trust. *Austin v. Willson's Executors*, 21 Ind. 252, and cases there cited. These cases relate to executors and administrators, but the rule is the same with reference to guardians. There is no reason requiring or justifying a relaxation of the rule. Trust property should be securely guarded, and the parties to every fraudulent diversion of it held to a strict and rigid account therefor.

The judgment is affirmed, with five per cent. damages and costs.

J. S. Harvey, for appellant.

H. C. Newcomb, J. L. Mitchell, and W. A. Ketcham, for appellees.

WARD ET AL. v. PATRICK.

PRACTICE.—*Motion for New Trial.*—Irregularity in the proceedings of the court and of the prevailing party, by which the defendants were prevented from having a fair trial, and error of law occurring at the trial, as statements of reasons in a motion for a new trial, are too general. The irregularity and the error of law should be pointed out and specified in the motion.

APPEAL from the Fountain Common Pleas.

OSBORN, J.—The appellee filed his complaint to set aside the probate of a will, and to declare the will invalid.

The cause was tried by a jury, which resulted in a verdict

Ward *et al.* v. Patrick.

for the appellee. Motion for a new trial overruled, exceptions, and final judgment on the verdict.

The causes set forth in the motion for a new trial were, first, irregularity in the proceedings of the court, and of the prevailing party, by which the defendants were prevented from having a fair trial; second, that the verdict is contrary to law; third, that the verdict is not sustained by sufficient evidence; fourth, error of law occurring at the trial and excepted to by the defendant.

The errors assigned are, first, in instructing the jury, which was excepted to at the time; second, in overruling the appellants' motion for a new trial; and, third, in misdirecting the jury in each of the instructions asked by the appellee.

The second assignment covers each of the others.

The appellee insists that no question arises on the first and fourth causes for a new trial; that to make those causes available the irregularity and error must be pointed out and specified in the motion. *Barnard v. Graham*, 14 Ind. 322; *Medler v. Hiatt*, 14 Ind. 405; *Scoville v. Chapman*, 17 Ind. 470, are directly in point in support of the position of the appellee. Indeed, it has been so frequently decided by this court, that a reference to the decisions seems to be unnecessary.

We have read the evidence in the case, and think it sufficient to sustain the verdict of the jury.

The appellants rely chiefly upon the erroneous charges to the jury to reverse the case, but as we have seen, under the motion for a new trial filed, they are not legitimately before us, and we cannot consider them.

The judgment of the said Fountain Court of Common Pleas is affirmed, with costs.

W. C. Wilson, for appellants.

J. M. Butler and *J. McCabe*, for appellee.

Mercer v. Patterson.

MERCER v. PATTERSON.

ASSIGNMENT OF ERROR.—On appeal to the Supreme Court, it may be assigned as error, that the complaint does not state facts sufficient to constitute a cause of action, although no demurrer has been filed in the lower court.

PROMISSORY NOTE.—*Special Demand.*—When a note is payable on demand, a special demand for payment need not be averred in an action thereon.

PRACTICE.—*Suppressing Deposition.*—*Ground for New Trial.*—Where a motion is made to suppress a deposition, and the court takes the motion under advisement, until after verdict, and then sustains the motion, but on the trial excludes the deposition, and there is a motion for a new trial on the ground of the suppression of the deposition, this cause includes the ruling excluding the deposition as evidence.

EVIDENCE.—*Husband and Wife.*—*Statements of Husband.*—After the marriage relation has terminated, the wife may testify as to statements made during its existence in her presence to other persons, by her husband, but she may not testify to communications made to her in private by her husband.

APPEAL from the Rush Circuit Court.

BUSKIRK, J.—This action was originally brought by the appellee against the appellant and his wife upon a note executed by them, but the action was dismissed as to Mrs. Mercer.

The appellant answered in three paragraphs; first, denial; second, that the note was executed without any consideration; third, that the appellee was the father of Mrs. Mercer, and father-in-law of appellant; that the appellee advanced to his daughter, the wife of the appellant, the sum of five hundred dollars, to aid appellant in the purchase of a farm; and that the note in suit was given simply as evidence of such advancement.

Reply in denial of second and third paragraphs of answer. Trial by the court, finding for plaintiffs, and, over motion for a new trial, judgment on finding.

The motion for a new trial was for the following causes: first, that the finding of the court is not sustained by sufficient evidence; second that the finding is contrary to law; third, that the court erred in suppressing the deposition of Nancy Patterson; fourth, newly-discovered evidence.

The appellant has assigned for error, first, because the complaint does not state facts sufficient to constitute a cause

of action; second, that the court erred in overruling motion for a new trial.

It is insisted by counsel for appellee that the sufficiency of the facts stated in the complaint can only be tested by a demurrer, and that the appellant, having failed to demur, cannot, for the first time, assign for error the insufficiency of the facts. It is expressly provided by the code, that such an assignment of error may be made, and such is the settled practice in this court.

The objection urged to the complaint is, that it does not aver a special demand of payment before the bringing of the action. It is claimed that, as the note was payable on demand, there should have been a special demand of payment. The position is untenable. *Bradfield v. M' Cormick*, 3 Blackf. 161; *Fankboner v. Fankboner*, 20 Ind. 62.

The complaint was good.

Did the court err in overruling the motion for a new trial?

One of the causes assigned for a new trial was the suppression of the deposition of Nancy Patterson. Before the trial commenced, the appellee moved to suppress said deposition, but the court took the motion under advisement, and did not announce a ruling on such motion until the finding was announced. The motion was sustained, and the deposition suppressed. It is shown by a bill of exceptions that the appellant, on the trial, offered to read in evidence said deposition, and that the appellee objected, and the objection was sustained, and the evidence excluded, to which the appellant excepted. It is urged by counsel for appellee that no question arises upon the record in reference to such deposition, because the reason assigned for a new trial was the suppression of said deposition, and not its exclusion as evidence, and that the question as to the suppression is not presented by a bill of exceptions.

It seems to us that, under the peculiar state of facts, the attention of the court below was properly called to the exclusion of such deposition. It is fully shown that appellant offered to read the deposition in evidence, and that it was

Mercer v. Patterson.

excluded. The court, in announcing its finding, sustained the motion that had been made before going into trial to suppress such deposition.

The objection urged to the testimony of Mrs. Nancy Patterson is, that she testified to certain admissions or statements made by the appellee as to the advancement of five hundred dollars to his daughter, Mrs. Mercer, and that when such statements were made, the witness was the wife of the appellee, and that they had been divorced. Mrs. Patterson testified that all of such admissions or statements, so far as they related to Mercer and his wife, were made to other persons in her presence and hearing. The witness testified that, after one of these conversations, she had a private conversation with her then husband, in which she asked him if he intended to give five hundred dollars to his daughter Rebecca, without giving the same amount to his other children, and that he stated that he intended to give the same sum to each of his other children when the proper time arrived.

We are required to decide whether Mrs. Patterson was a competent witness. If she was competent to testify to any of the matters stated in her deposition, then the court erred in suppressing and excluding the entire deposition. If any portion of her testimony was incompetent, the motion to suppress should have been directed to such portion, and the objection to the admissibility of the same in evidence should have been confined to such incompetent part. It is provided by the second section of the act in regard to witnesses, approved March 11th, 1867, that it shall not be competent for husband and wife to testify as to matters for or against each other, or as to communications made to each other during marriage, except, etc. 3 Ind. Stat. 560.

The appellee and Mrs. Patterson having been divorced, her testimony was not incompetent upon the ground that she was testifying either for or against her husband. They had ceased to be husband and wife, and with the termination of that relation her incompetency ceased.

Can her testimony be regarded as a communication made to her by her husband during the marriage? The statute creates no new law. It re-enacts what was the well settled principle of the common law. It should be observed that the statute only excludes communications made to each other, and has no application to communications made to third persons in the presence and hearing of each other. The case of *McGuire v. Maloney*, 1 B. Mon. 224, is very much in point.

The court say: "It is, nevertheless, true that the policy of the law, subserving the fundamental interests of society, so far protects that privacy and confidence which are essential to the marriage relation, and necessarily spring from it, as not only not to allow, but to prevent, even after the termination of the coverture, any disclosure by the wife, in a court of justice, which implies a violation of the confidence which was reposed in her as a wife. The argument of the counsel for the appellant would go much farther, and seal the lips of the wife from disclosing any act or declaration of the husband, done or said in her presence, and especially in his own house. But neither the principles laid down by the elementary treatises referred to, nor any adjudged case which has been seen, nor the reason and purpose of the law require, or indeed authorize such an extension of the rule. The law will not permit, even after the death of the husband, any disclosure by the wife, which seems to violate the confidence reposed in her as a wife, lest such permission might tend to impair the harmony of the marriage state, and to affect, injuriously, the interests of society dependent upon it. But where there is not even a seeming confidence, when the act done or declaration made by the husband, so far from being private or confidential, is designedly public at the time, and from its nature must have been intended to be, afterward, public, there is no interest of the marriage relation or of society which, in the absence of all interest of husband or wife, requires the latter to be precluded from testifying between other parties, such act or declaration

Mercer v. Patterson.

not affecting the character or person of the husband. Accordingly, in the case of *Jackson v. Van Dusen*, 5 Johns. 144, the wife was permitted to prove a parol division between her deceased husband and his brothers, although her knowledge of the facts was, in part, derived from communications of her husband; and in the case of *Jackson v. Bard*, 4 Johns. 230, the wife was permitted to prove that a deed, purporting to have been executed by her husband and herself, was antedated. In each of the cases of *Allison's Devisees v. Allison's Heirs*, 7 Dana, 90, and *Singleton's Devisees v. Singleton's Heirs*, 8 Dana, 315, the widow of the deceased testator was a witness in the contest between the heirs and devisees, to prove the acts and declarations of the deceased, which might affect the validity of the will."

To the same effect are the following authorities: *Cornell v. Vanartsdalen*, 4 Pa. St. 364; *Wells v. Tucker*, 3 Binney, 366; *Williams v. Baldwin*, 7 Vt. 503; *Coffin v. Jones*, 13 Pick. 441; *Saunders v. Hendrix*, 5 Ala. 224; *Jack v. Russey*, 8 Ind. 180; *Carpenter v. Dane*, 10 Ind. 125; *Woolley v. Turner*, 13 Ind. 253.

We are very clearly of the opinion that Mrs. Patterson was a competent witness as to the declarations and statements made by her then husband to third persons, in her presence, and that the communication made to her in private by her husband was privileged and incompetent.

The court erred in suppressing and excluding the deposition of Mrs. Patterson, for which the judgment must be reversed.

The conclusion to which we have arrived renders it unnecessary for us to notice the other questions discussed.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to grant a new trial, and for further proceedings in accordance with this opinion.

G. H. Punlenny, S. F. King, and J. Helm, for appellant.
G. B. Sleeth and A. B. Campbell, for appellee.

The State, *ex rel.* Morris, *v.* Wallace.

THE STATE, EX REL. MORRIS, *v.* WALLACE.

CLERK.—*Criminal Prosecution.—Appeal.—Transcript.—Costs.*—The clerk of the court, in a criminal prosecution, on conviction of the defendant, is required by law, when the defendant appeals to the Supreme Court, to make out and deliver to him a transcript of the papers, proceedings, and judgment, without the previous payment of his fees therefor.

SAME.—*Constitutional Law.*—The clerk takes his office with its burdens, and the constitutional provision touching services without compensation does not apply to him.

SAME.—*Civil Code.—Sections 15 and 16.—Poor Persons.*—Sections fifteen and sixteen of the civil code, referring to the prosecution and defence of actions by poor persons, have no application to the defence of criminal prosecutions.

SAME.—*Section 558.*—Section five hundred and fifty-eight of the civil code, 2 G. & H. 273, has no reference to criminal cases.

SAME.—*Criminal Code.—Appeal.*—Appeals in criminal actions are taken in the manner, and in the cases, prescribed in article fourteen of the criminal code, 2 G. & H. 425, section 149, and are not governed by the civil code.

DOWNEY, J.—This is an application for a mandate against the defendant, as clerk of the Marion Criminal Court, made originally in this court. It is stated in the affidavit on which the application is based, that the relator was indicted, tried, and convicted of a misdemeanor in the said criminal court, a motion for a new trial and in arrest of judgment having been made and overruled; that he then appealed to this court, and demanded of the defendant, as such clerk, to make out and deliver to him a transcript of the papers, proceedings, and judgment in the cause, to enable him to perfect his appeal, with which demand the defendant refused to comply.

The defendant, having been notified beforehand of the application, appeared to the motion, and filed a return or answer, in which he states, in substance, that he caused the transcript to be made out, as soon as the business of his office would allow, and offered to deliver it to the relator on payment of the legal fee therefor, which the relator refused to pay; that the relator did not defend said prosecution as a poor person, nor claim the record as such; that he believed and still believes, he had the right to require pay for said

The State, *ex rel.* Morris, *v.* Wallace.

record, before he was bound to deliver the same; that he had no thought of acting oppressively or of hindering or obstructing the due administration of public justice, in refusing the transcript, and submits that he has the right to such fees before delivering the same. He further states that, if this court shall be of the opinion that he should deliver the said transcript without his fees therefor having been paid, he is ready and willing to do so.

To this answer or return the relator has filed a demurrer, alleging that the same does not state facts sufficient to constitute a defence to the action.

The question is this: Is the clerk, in a criminal prosecution, on conviction of the defendant, required by law, when the defendant appeals to this court, to make out and deliver to him a transcript of the papers, proceedings, and judgment without the previous payment of his fees therefor?

Counsel for the relator refer us to section twelve of article one of the constitution of the State, which provides, that all courts shall be open; and every man, for injury done to him in his person, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay. And also to section thirteen of the same article, which provides, that, in criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury, in the county in which the offence shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. These sections, although they have a general bearing upon the question, do not specifically meet the point involved.

The administration of criminal law in this State proceeds upon the rule that, if the defendant is innocent, he should not be subjected to any penalty or to the payment of any costs.

It is accordingly provided by section 169 of the criminal,

code, 2 G. & H. 428, that, when the defendant is acquitted in a criminal action, he is not liable for any costs, except when otherwise provided in this act. It is also provided, in the act of March 8th, 1873, relating to the fees of officers, as it was in preceding acts on the subject, section 38, as follows: "In all criminal cases where the person accused shall be acquitted, no costs shall be taxed against such person, nor against the State or county for any services rendered in such prosecution by any prosecuting or district attorney, clerk, sheriff, coroner, justice of the peace, constable or witness; but in all cases of conviction, such fees and costs shall be taxed and collected, as in other cases, from the person convicted."

It may be thought that when the defendant, the relator, was convicted in the criminal court, he then became liable to pay costs thenceforward. But at that stage of the case another section of the criminal code comes to his relief. It is provided, by section 148, 2 G. & H. 425, that, an appeal to the Supreme Court may be taken by the defendant, as a matter of right, from any judgment against him, and upon the appeal, any decision of the court, or intermediate order made in the progress of the cause, may be reviewed.

It is not questioned but that the officers of the court are bound to perform their duties for the defendant, and that witnesses for him are bound to attend upon his summons, without pay therefor, up to the time of his conviction. We can see no reason why his right to a transcript of the record, upon an appeal to this court, without such payment, is not a right of equal importance and equally well secured to him. The sections to which we have referred, relating to the liability of the defendant in a criminal case to pay costs, on conviction, should be construed to relate to the final termination of the case against him. The State pays no costs, whether the defendant be convicted or acquitted. If the defendant be compelled to pay costs for a transcript, or for any other service rendered by any officer or any witness, and

The State, *ex rel.* Morris, *v.* Wallace.

the judgment of conviction should be reversed in this court, and the defendant ultimately acquitted, he can never recover the amount back or be reimbursed in any way known to the law. We do not think that this was contemplated by the constitution or by the statute. It is true that upon a conviction, it is a part of the judgment that the defendant stand committed till the fine and costs which have accrued are paid or replevied, and that execution may issue on the judgment against his property for the collection of such costs; 2 G. & H. 421, secs. 128 and 129; and this may be done during the pendency of the appeal, unless the judgment be replevied or its execution stayed by order of this court. 2 G. & H. 422, sec. 131, and p. 426, sec. 154. If the defendant be ultimately acquitted, he ought to pay no costs. If he be found guilty ultimately, he must pay all costs. Although the officer or the witness does not get his fees at the time when the services are rendered, he is entitled to them at the end of the case, and will receive them if their payment can be coerced from the defendant by his imprisonment, or made on execution against his property.

The constitution, it is true, provides, that no man's particular services shall be demanded without just compensation, etc. Sec. 21, art. 1. Persons, however, who are elected to, and take upon themselves the duties of, a public office, such as that of clerk of a court, are understood to take the office with its burdens, *cum onere*. It was said by this court, in *The Board of Commissioners of Miami Co. v. Blake*, 21 Ind. 32: "At common law, then, the officers depend upon the parties for their fees, except the State, which they nominally serve gratuitously, but, in reality, get their pay, because the State fixes the rate of fees they charge private parties so high as to compensate them, in their aggregate receipts, for their services in the state cases, where there are acquittals; and this is what is meant when it is said that officers take their offices *cum onere*, and the constitutional provision touching services without compensation does not apply to

such. *Falkenburgh v. Jones*, 5 Ind. 296; *Israel v. The State*, 8 Ind. 467. See Ind. Dig. Tit. Costs."

Notwithstanding what is said in *Falkenburgh v. Jones*, *supra*, we do not think that sections 15 and 16 of the civil code, with reference to the prosecution and defence of actions by poor persons have any application to the defence of criminal prosecutions. If they do, then the clerk in this case was not bound to furnish the transcript without his pay in advance, for the reason that there was no compliance by the defendant with those sections. If these sections govern, then no officer or witness would be bound to render any services in a criminal case for the defendant without pay, unless the defendant had complied with the sections by satisfying the court that he was a poor person, not having sufficient means to defend an action, and was admitted by the court to defend as a poor person. We do not think that this has ever been understood by the profession in the State, or acted upon by the courts, as the law applicable in criminal cases. If they are applicable to criminal cases, why was it necessary to enact that the defendant in criminal causes should not be liable for costs when he was acquitted? If he could only escape the payment of costs by getting an order admitting him to defend as a poor person, and that order exempted him, then there was no occasion for the sections to which we have referred exempting him in criminal cases when acquitted; for if he defended as a pauper, he was not, according to those sections, liable, and could not be made liable in any event, whether acquitted or convicted. "It is as much the duty and interest of every citizen to aid in prosecuting crime, as it is to aid in subduing any domestic or foreign enemy; and it is equally the interest and duty of every citizen to aid in furnishing to all, high and low, rich and poor, every facility for a fair and impartial trial when accused; for none is exempt from liability to accusation and trial." *Israel v. The State*, *supra*. See, on the subject of costs in criminal cases, *The Board of Commissioners of Brown Co. v. Summerfield*, 36 Ind. 543.

Ferguson et al. v. Wagner.

Counsel for the defendant refer us to section 558 of the civil code, 2 G. & H. 273, which provides, that upon request of the appellant, or upon being served with notice, and in either case upon the payment of the proper fee, the clerk shall forthwith make out and deliver the transcript, etc. We are clearly of the opinion that this section has no reference to criminal cases. Appeals in criminal actions are taken in the manner and in the cases prescribed in article 14 of the criminal code, 2 G. & H. 425, sec. 149, and are not governed by the civil code.

The demurrer to the return or answer is sustained; and, as the defendant has expressed the desire that the case may be finally disposed of on the demurrer, it is ordered by the court, that he furnish the transcript in said cause to the relator, without the previous payment of his fees therefor, and that he pay the costs of this proceeding.

J. S. Harvey, F. J. Mattler, and Prinkel & Reiman, for plaintiff.

J. Hanna and F. Knefler, for defendant.

FERGUSON ET AL. v. WAGNER.

PROMISSORY NOTE AND MORTGAGE.—*Condition.*—*Tender.*—A mortgage to secure a note for one thousand dollars contained the following clause: "We, the mortgagors, expressly agree to pay the sum of money above secured, without any relief from valuation or appraisal laws; reserving to themselves the right, and this note and mortgage is given upon that expressed condition, to pay the mortgage within the period of twenty days from the date hereof, the sum of nine hundred dollars, eight hundred cash and one hundred dollars in a promissory note payable one day after date, which he agrees to accept in consideration of the above mortgage debt and cause the same to be entered of record." On the trial of an action to foreclose said mortgage, there was a

Ferguson *et al.* v. Wagner.

special finding, that one of the mortgagors had offered to pay the eight hundred dollars and deliver the note for one hundred dollars, within the twenty days, on condition that the mortgagee would assign and transfer the note for one thousand dollars and the mortgage to a third person.

Held, that the offer did not amount to a tender within the above clause of the mortgage; and it was not important what reason the mortgagee gave for his refusal to accept the offer.

PLEADING.—Reply.—Failure to Reply.—Where there are separate paragraphs of an answer filed by different defendants, a reply in these words, "The plaintiff for reply to defendant's answer, says that he denies each and every allegation to the answer," may be taken to be a reply to each paragraph of the answer. At all events, a defendant going to trial without objection waives a reply to his answer, and the same will be regarded as controverted.

APPEAL from the Cass Common Pleas.

WORDEN, J.—This was an action by the appellee, Lewis Wagner, against Sebastian C. Ferguson and Joseph Z. Wagner and their wives, to foreclose a mortgage executed by the said Sebastian and Joseph Z., together with their wives, to the said Lewis, to secure the payment of a note for one thousand dollars, due one year from date, with interest at the rate of ten per cent. per annum. The note and mortgage were dated June 28th, 1869. Richard Ferguson was made a party defendant to answer as to his interest in the premises, he having purchased the equity of redemption.

The mortgage contained the following clause:

"We, the mortgagors, expressly agree to pay the sum of money above secured, without any relief from valuation or appraisement laws, reserving to themselves the right, and this note and mortgage is given upon that expressed condition, to pay the mortgage within the period of twenty days from the date hereof, the sum of nine hundred dollars, eight hundred dollars cash and one hundred dollars in a promissory note payable one day after date, which he agrees to accept in consideration of the above mortgage debt and cause the same to be entered of record."

The defendants Sebastian C. Ferguson and Joseph Z. Wagner pleaded a tender of the money, and a note signed by them, in accordance with the terms, and within the time provided for by the above stipulation, and brought the

Ferguson et al. v. Wagner.

money and note into court and deposited them with the clerk.

Richard Ferguson answered, that, within twenty days after the execution of the note and mortgage, he purchased the interest of the said Sebastian in the premises, with full knowledge of the existence of the mortgage and the conditions thereof; that it was a part of the condition of his purchase that eight hundred dollars of the purchase-money paid by him should be applied by the said Sebastian in the discharge of the said mortgage debt, in accordance with the conditions of the mortgage; that he subsequently purchased the interest of the said Joseph Z. Wagner; that all his purchases have been made subject to the mortgage, and with the knowledge that the payment had been tendered to the mortgagee, in accordance with the conditions of the mortgage, within the period of twenty days after the execution thereof, and that the tender had been kept good, etc.; wherefore he says that the mortgaged premises are discharged of the lien, etc.

The plaintiff replied in these words:

"Wagner *v.* Ferguson. The plaintiff, for reply to defendant's answer, says that he denies each and every allegation to the answer."

There was a second paragraph of the replication, but as no point is made upon it in the brief of counsel, we need not notice it further.

The cause was submitted to the court for trial, and the court found the facts specially, and stated its conclusions of law thereon. We set out so much of the facts found and the legal conclusions as are necessary to an understanding of the grounds upon which a reversal is asked in the brief of counsel for the appellants. The court found, amongst other things, "that the defendants Sebastian C. Ferguson and Joseph Z. Wagner, on the 12th day of July, 1869, made and signed their promissory note for one hundred dollars, payable to the plaintiff, due one day after date, waiving valuation laws, and stipulating to pay ten per cent. per annum inter-

Ferguson et al. v. Wagner.

est; that the defendant Joseph Z. Wagner, on the day last aforesaid, informed the plaintiff that such a note had been drawn up and signed, and was in the possession of his codefendant, Sebastian C. Ferguson, who intended to deliver the same, together with eight hundred dollars, to plaintiff, in payment and satisfaction of the said mortgage, but warned the plaintiff not to accept the said note, as his signature thereto had been procured by fraud, and he would not pay the same; that soon after the plaintiff had been so informed, and on said 12th day of July, 1869, the defendant Sebastian C. Ferguson tendered to the plaintiff eight hundred dollars in cash, and the note for one hundred dollars above described, if the plaintiff would assign and transfer the said note for one thousand dollars and the said mortgage to the defendant Richard Ferguson; that the said eight hundred dollars and the one-hundred-dollar note aforesaid were not tendered to the plaintiff unconditionally and in payment and full satisfaction of said one-thousand-dollar note and mortgage, but the said tender was made upon the condition that the said note and mortgage should be assigned and transferred to the said Richard Ferguson as aforesaid and the plaintiff refused to accept said money and note so tendered, for the reason that the same was offered, not in payment and satisfaction of said note and mortgage, but for the purpose of procuring the assignment of the same to Richard Ferguson."

As a conclusion of law upon the facts found by the court, the court say, "that there was no tender by the defendants, or either of them, to the plaintiff of eight hundred dollars and a promissory note for one hundred dollars, within twenty days after the execution of the note and mortgage sued on, in payment and satisfaction thereof, as was contemplated by the provisions of the mortgage; that the plaintiff had the right to reject the conditional tender made to him, and hold the defendants liable upon the note and mortgage sued on."

There was no exception to the conclusion of law upon the

Ferguson et al. v. Wagner.

facts found, but the defendants moved for a new trial, for the reason, amongst other things, that the finding was not sustained by the evidence. The defendants excepted. Richard Ferguson moved for judgment in his favor on the pleadings, because his separate answer was not replied to, and was therefore to be taken as confessed to be true, but this motion was overruled, and he excepted. It was ordered that the plaintiff receive the eight hundred dollars tendered by defendants, and deposited with the clerk, and have judgment of foreclosure for the residue of the thousand dollars and interest.

There are but two questions made in the cause. First. Does the evidence sustain the finding of the court on the subject of the tender? Second. Was Richard Ferguson entitled to judgment on the ground that his answer had not been replied to?

The evidence in respect to the tender was somewhat conflicting. Possibly it might be said that the evidence preponderated in favor of the defendants. But there certainly was evidence in support of the finding. The plaintiff testified as follows: "On the 12th of July, 1869, Joseph Z. Wagner, one of the defendants, came to me in the field, in Howard county, and told me that Ferguson would be down to make a tender on that mortgage. He said he had the money and a note signed by himself and Ferguson for one hundred dollars, and warned me not to take the tender, and said that the note had been got by fraud, and that the Fergusons wanted to get the property in their own hands. Soon after he went away, Ferguson came. He brought Alfred Brower with him. He said that he had come to redeem that mortgage, and that if I would come to the house and sign it over to his father, Richard Ferguson, he would give me the money; he never offered me any note; he said he had a note signed, and would put a stamp on it and cancel it; he never said that I could have the note and money without the conditions; I don't consider that he ever made a tender of the note at all; I never saw it; he never offered to make the tender in full

payment of the mortgage and note without the condition that I should assign the mortgage to his father; I told him that my brother had notified me that the note was not good, and that I should not take it."

There was other evidence tending strongly to show that an unconditional tender was made, but under the well-established practice, we cannot, in such case, disturb the finding below.

But it is urged that, as the plaintiff gave as a reason for not accepting the supposed tender, that he had been notified that the note supposed to have been tendered was not good, he cannot be heard to set up any other reason for refusing the tender. If, however, as found by the court, no offer of the money and note was made to the plaintiff, except upon the condition that he would assign the mortgage and the note secured thereby to Richard Ferguson, then there was really no tender made at all. Such offer was a mere overture; a mere proposition, to be accepted or rejected, as the plaintiff saw fit. Such offer falls far short of a tender. The finding of the court, as above set out, is a finding in substance that there was no tender made at all. When the offer of the note and money was made to the plaintiff if he would make the assignment, he had a right to reject the offer for any reason he saw proper to give, or without any reason whatever; and no reason which he might give for rejecting such offer could convert it into a tender in satisfaction of the note and mortgage sued on.

We pass to the second question. We are inclined to the opinion that the reply filed might well be regarded as applying to the answers of all the defendants. But if this is not the case, the defendant Richard Ferguson, by going to trial without a reply to his answer, waived the filing of such reply, and his answer will be deemed as controverted, without such reply's being filed. *Irvinson v. Van Riper*, 34 Ind. 148; *Train v. Gridley*, 36 Ind. 241; *Pattison v. Vaughan*, 40 Ind. 253.

The judgment below is affirmed, with costs.

D. B. McConnell and *H. C. Thornton*, for appellants.

T. C. Annabal and *D. B. Anderson*, for appellee.

Parton et al. v. Yates et al.

PARTON ET AL. v. YATES ET AL.

FRAUD.—*Consideration.*—The question of fraudulent intent in the conveyance of property is a question of fact, and want of consideration for the conveyance alone will not establish such intent, as against creditors.

SAME.—*Deed to Vest Legal Title in Equitable Owner.*—Where property has been conveyed to a husband, the consideration paid therefor being the property of his wife, and a note of the husband has been given for the remaining purchase-money, being one-third of the entire consideration, said note being secured by mortgage on the property conveyed, it is not fraudulent for the husband and wife, such note being still unpaid, to convey the property to a third person, and for such person to reconvey to the wife, in order to vest the title in her, she never having consented to the title's being vested in her husband.

APPEAL from the Henry Circuit Court.

WORDEN, J.—This was an action by the appellees against the appellants to set aside conveyances of certain real estate made by Charles Parton to William Parton, and by William Parton and his wife to Jennetta Parton.

The plaintiffs were judgment creditors of Charles Parton, having procured judgments before a justice of the peace and filed transcripts thereof in the proper clerk's office.

It is alleged that the conveyances were made without any consideration, and with the fraudulent purpose to cheat, hinder, and delay the plaintiffs and other creditors, and that the parties thereto combined and confederated together for that purpose.

Answer of general denial, trial by jury, verdict and judgment for plaintiffs, a new trial being refused to defendants, and exception.

The facts in the case, so far as the conveyances in question are concerned, are as follows:

Jennetta Parton, who is the wife of said Charles, was the daughter and one of the heirs of Joseph Foster, deceased. She inherited from her said father about eighteen acres of land as her share of the estate. Partition seems to have been made by the heirs of Joseph Foster amongst themselves, and on the 22d of September, 1866, the other heirs of said Joseph executed a conveyance to the said Charles

and Jennetta of eighteen acres of the land. Why the name of Charles was inserted as a grantee in this deed does not appear.

Afterward, in February, 1871, said Jennetta sold the eighteen acres to her brother, Elijah Foster, for one thousand six hundred dollars, and we infer a conveyance was made by her and her husband accordingly. For the land thus purchased by Elijah Foster he paid a debt owed by Charles Parton of one hundred dollars, and gave two notes for the residue, one for one thousand dollars, and one for five hundred dollars. These notes were made payable to Charles Parton.

Before the conveyance to Elijah Foster, Jennetta had in view the land in controversy in this suit, and had ascertained for what it could be purchased. It consists of two separate parcels, one of five acres, and one of twenty-five. The smaller piece was owned by Mary Kaoge, and the larger by Eliza Griffin. Jennetta sent her husband, Charles, as her agent, to purchase them, after the sale of the other land to Elijah Foster. The purchase was made, the smaller piece for five hundred dollars, and the larger for one thousand five hundred dollars. The smaller piece was paid for by transferring to Mary Kaoge the five-hundred-dollar note executed by Elijah Foster, and nine hundred dollars was paid to Eliza Griffin out of the proceeds of the other note given by Elijah Foster, leaving six hundred dollars still due to Griffin. For this sum, Charles Parton executed his notes to Griffin, and he and Jennetta executed a mortgage on the premises to secure the payment thereof. This mortgage remains wholly unpaid. Charles Parton has paid nothing upon the premises, nor has he invested anything therein in any way.

The deeds from Mary Kaoge and Eliza Griffin, which were executed March 9th, 1871, convey the land nominally to Charles Parton. Jennetta was not present when they were executed, and never consented that they should be made to him.

Upon ascertaining that the deeds were made to her hus-

band, Jennetta went to the officer before whom they were acknowledged and told him she was not satisfied with the deeds to her husband, and wanted them changed so that the property should be in her name. Charles also applied to the officer for the same purpose. The officer advised them that the only way to effect the purpose would be to convey to a third person, and he could convey to Jennetta. Charles accordingly conveyed the property to William Parton, and the latter, together with his wife, conveyed to Jennetta. These latter conveyances were without consideration, and were resorted to for the mere purpose of vesting the title in Jennetta.

Charles Parton seemed to have no other property out of which the plaintiffs' debts could be collected. These are believed to be the material facts, and about them there is no conflict, as we can perceive, in the evidence.

We are of opinion that the verdict and judgment should not be sustained.

The twenty-first section of the act for the prevention of frauds and perjuries, etc., provides, that "the question of fraudulent intent, in all cases arising under the provisions of this act, shall be deemed a question of fact, nor shall any conveyance or charge be adjudged fraudulent, as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration."

Charles Parton has invested nothing in the property in controversy. It has been paid for solely, so far as payment has been made, with the proceeds of the property which his wife Jennetta inherited from her father. The simple fact that the notes given by Elijah Foster for the property purchased by him were made payable to Charles was not sufficient to establish the proposition that Jennetta intended to give them, or the proceeds thereof, to him. Indeed, we find nothing in the case that sufficiently establishes such intention on her part.

Without stopping to inquire as to the legal effect of the deed from the other heirs of Joseph Foster to Charles and

Jennetta, or the deeds from Griffin and Kaoge to Charles, or how far any trust attaches to them in favor of Jennetta, we are of opinion that the imputed fraudulent intent is not sufficiently established, and that a new trial should have been granted. The want of a valuable consideration passing from William to Charles Parton, or from Jennetta to William and his wife, as we have seen, is not of itself sufficient to establish the fraud. The proceeds of Jennetta's property being all that was invested in that in controversy, it could scarcely be fraudulent on her part to take such steps as were necessary to secure the legal title. There must have been a fraudulent intent on her part, as well as on the part of her husband, in order that the conveyance be set aside. *Doe v. Horn*, 1 Ind. 363.

Indeed, as Charles had invested nothing in the property, it having been paid for, so far as payment had been made, with the proceeds of his wife's inheritance, a better motive than the fraudulent purpose of placing it beyond the reach of his creditors might well be imputed to him in securing the legal title to her. The question of fraudulent intent is one of fact, and however reluctant we may be to differ with the jury and the court below upon such a question, we must act upon our own convictions, and not theirs. Substantial justice requires, as we think, that a new trial be granted.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

J. Brown and *R. L. Polk*, for appellants.

M. E. Forkner and *E. H. Bundy*, for appellees.

MERCER v. HEBERT.

41	459
158	308

PLEADING.—*Exhibit.*—When a pleading is founded upon a written instrument, a copy of which is filed with the pleading and referred to therein, it becomes a part thereof, and its contents need not be stated.

PROMISSORY NOTE.—*Answer.*—*Sale of Stock.*—*Future Value.*—In a suit upon

Mercer v. Hebert.

a promissory note, it substantially appeared, from the answer, with an instrument referred to therein by copy, that the defendant sold to the plaintiff certain shares of bank stock at their nominal value, to which was to be added the difference between the par value and the actual value thereof at a specified date; and that the amount was to be applied on the note. If the parties should agree on the value, it was to be binding on them; if not, a method was fixed for determining the value. The value of the stock at said specified date was alleged in the answer, and the failure to credit the same on the note as agreed.

Held, that the answer was good on demurrer.

APPEAL from the Elkhart Circuit Court.

BUSKIRK, J.—The complaint was upon a promissory note in the ordinary form. The answer was originally in three paragraphs, but a demurrer having been sustained to the third paragraph, the first and second paragraphs were withdrawn, and the appellant refusing to plead over, judgment was rendered in favor of the appellee.

The only error assigned calls in question the correctness of the ruling of the court in sustaining the demurrer to the third paragraph of the answer, which reads as follows:

"For further partial answer the defendant avers that heretofore, to wit, on the — day of —, 1869, defendant being the owner thereof, assigned to the plaintiff as collateral security for the payment of his said demand, twenty-five hundred dollars of the capital stock of the First National Bank of Goshen, Indiana, said assignment being made upon the books of the said bank, of which the said defendant was at said time and is now the president; that afterward, to wit, on the — day of — 1870, defendant sold and assigned to W. W. Griffith, James McDowell and others, named in the written agreement, a copy of which is attached hereto, certain other shares of the stock of said bank, upon the terms and conditions named in said agreement; that afterward plaintiff requested that certificates of stock so assigned to him as aforesaid be issued to him, whereupon defendant informed him, plaintiff, that if he took certificates of said stock, and became the owner thereof, he could and must take them on the terms named in said agreement, and give the defendant credit on said note for the value of said stock

on the first day of July, A. D. 1870, said value to be determined in the manner prescribed in said agreement; that accordingly plaintiff did accept certificates of said stock, and agree to apply said value thereof on said note; but defendant avers that he has failed and neglected so to do. Defendant avers that on the first day of July, 1870, said stock was worth the sum of four thousand dollars; wherefore," etc.

The agreement referred to in the above answer is as follows: "In consideration of the sale and transfer to us, whose names are subjoined, of stock in the First National Bank of Goshen, the amount thereof appearing on the appropriate bank books, for which we have already paid said Milton Mercer the par value thereof, dollar for dollar, and in further consideration of the fact that the true value thereof cannot be correctly ascertained at this time. It is therefore as a part of the terms of said sale and transfer of stock to us hereby covenanted and agreed that we • will separately and severally, each for himself, and not one for another, well and truly pay, or cause to be paid, to the order of the said Milton Mercer, without any relief whatever from valuation and appraisement laws, the actual value in cash of said stock, so bought by us on the first day of July, 1870, over and above its par value which has already been paid, the actual value of said stock on the first day of July, 1870. If any disagreement arises thereon, to be settled and determined by the books of the bank and the market value of government securities on that day; said Mercer is to allow interest at the rate of ten per cent. on the several amounts paid by us from this date until the first day of July, 1870, to be deducted from the then actual value of said stock.

W. W. GRIFFITH,
JAMES McDOWELL,
E. PURL,
WILLIAM A. THOMAS,
J. W. VIOLETT,
JOHN H. PATRECH,
JAS. LAUFERTY."

Mercer v. Hebert.

It is insisted by counsel for appellee, that the answer was defective for three reasons:

"First. That it nowhere sets out in its body the substantial portion of the contract, referred to in it, as to the price for which the shares of the capital stock were sold.

"Second. That it does not aver a price at which this stock was sold.

"Third. That it does not aver that that price had been determined in accordance with the terms of the contract."

In support of the above positions, we are referred to the cases of *Woodward v. Wilcox*, 27 Ind. 207; *Mason v. Weston*, 29 Ind. 561; *Clarke v. Featherston*, 32 Ind. 142.

We have examined the above cases, and are of opinion that they have no application to the present case. It was decided in the above cases that each paragraph of a pleading must be complete in itself. It was not sufficient, in a second or subsequent paragraph, to refer to a fact or averment contained in a preceding one, without setting out such fact or averment. That is not the question here. The question in the present case is, was the paragraph of the answer to which the demurrer was sustained complete in itself, and did the facts recited constitute a valid defence to the action? The first objection urged is, that it is not averred in the body of the answer at what price the shares of stock were sold. The entire defence was based upon the contract referred to. In such case a copy of the instrument must be filed with the pleading. An averment of what the instrument contained is not sufficient. *Seawright v. Coffin*, 24 Ind. 414.

When a pleading is founded upon a written instrument, and a copy is referred to in and filed with such pleading, it becomes a part thereof, and in determining the sufficiency of such pleading, such instrument is regarded and treated as composing a part thereof. When an instrument is thus made a part of a pleading, it speaks for itself, and it is not incumbent upon the pleader to state the substance thereof.

The averments of a pleading may be aided and made certain by reference to instruments upon which it is founded,

Over v. Moss.

and which are filed with and made a part thereof. *Booker v. Ray*, 17 Ind. 522. When the answer is construed in connection with the instrument upon which it is founded, it is sufficiently certain. The answer when so construed amounts to this, that the defendant sold to the plaintiff the said shares of stock at their then nominal value, to which was to be added the difference between the then par and the actual value thereof on the first day of July, 1870; and in case of disagreement as to such actual value, it was to be determined by the books of the bank and the market value of government securities on that day. If the parties agreed as to the value, then such agreement would be binding. If there was no agreement, then the actual value was to be determined by an examination of the bank books and proof as to the value of the government securities on the day named.

We entertain no doubt that the answer was good, and that the court erred in sustaining a demurrer to it.

The judgment is reversed, with costs; and the cause is remanded to the court below, with instructions to overrule the demurrer to the third paragraph of the answer, and for further proceedings in accordance with this opinion.

W. A. Woods, for appellant.

A. S. Blake and *R. M. Johnson*, for appellee.

OVER v. MOSS.

LANDLORD AND TENANT.—*Practice.—New Trial as of Right.*—A tenant holding over against his landlord or his grantee is not entitled to a new trial, as a matter of right, in an action commenced before a justice of the peace and on appeal decided in the circuit court in favor of the landlord's possession.

APPEAL from the Green Circuit Court.

DOWNEY, J.—The only question in this case is, whether the defendant, in an action by a landlord or his grantee against his tenant holding over, commenced before a justice of the peace, appealed to the circuit court, and judgment

41	463
141	315
41	463
108	9

The State v. Earl.

rendered there against the defendant, can have a new trial, as a matter of right, according to section 601, p. 283. 2 G. & H.

We are of the opinion that the section referred to does not apply to such cases, and that consequently a new trial, as of right, cannot be had.

The judgment is affirmed, with costs.

J. D. Alexander, for appellant.

J. M. Hanna, for appellee.

THE STATE v. EARL.

CONTEMPT.—*Practice*.—In a proceeding for an alleged constructive contempt, except, perhaps, where it is to enforce a civil remedy, if the person charged fully answers all the charges against him, he will be discharged as to the attachment, and the court cannot afterward hear evidence to impeach or contradict him.

OSBORN, J.—On the 18th of March, 1873, this court, on its own motion, entered a rule in the above entitled cause, requiring the defendant to appear before the court on the 26th, and show cause, if any he could, why he should not be attached for an alleged contempt. The order recited a correspondence between our Chief Justice and the defendant, by which it appeared that the defendant had paid out large sums of money (and as it was intimated), for the purpose of unduly and corruptly influencing the action of the judges in a cause pending therein. The correspondence had been published, and the newspapers containing it were laid before us. And we deemed it fit and proper to enter the rule, in order that if money or other means had been improperly used, or attempted to be used, to influence the decision of the court, an investigation might be had, and the guilty parties punished. The rule required that the persons to whom the money was paid by the defendant should also be summoned

to testify as witnesses. The attorney general was directed to take charge of the case on behalf of the State. On the return day of the rule, the defendant appeared in open court, waived the filing of interrogatories, and filed his own affidavit and the affidavits of each of the persons ordered to be summoned. In his affidavit he explicitly and fully denies all the charges and allegations in the rule, and states why and for what purpose the money was paid to the persons named; that it was paid to them as attorneys in the case, and for no other purpose whatever. The affidavits of the other persons corroborate him. They also state that no part of the money paid was used, or attempted to be used, to influence the judges, or either of them.

On reading the affidavits, the defendant moved to dismiss the proceedings, on the ground, first, that this court has no jurisdiction to punish for constructive contempt; and, second, because no affidavit was filed upon which to predicate the order of the court. He also moved to discharge the rule, because he had fully purged himself of the alleged contempt.

We have examined the authorities, and are satisfied that in all cases of proceedings for alleged constructive contempts, except, perhaps, when they are to enforce a civil remedy, if the party charged fully answers all the charges against him, he shall be discharged, as to the attachment, and that the court cannot, after that, hear evidence to impeach or contradict him. 4 Bl. Com. 286; *Saunders v. Melhuish*, 6 Mod. 73; *Thomas's Lessee v. Cummins*, 1 Yeates, 40; *In the matter of Moore*, 63 N. C. 397; *The United States v. Dodge*, 2 Gallis. 313; *People v. Few*, 2 Johns. 290.

As to the first and second points, we deem it unnecessary to pass upon them in this case, as the defendant has answered all the charges against him. They are important questions, and we are not willing to embarrass ourselves or our successors by unnecessarily expressing an opinion upon them.

Cain v. Hunt et al.

Let this rule be discharged.

J. C. Denny, Attorney General, for the State.

R. C. Gregory, J. R. Coffroth, W. R. Harrison, and J. A. Stein, for defendant.

CAIN v. HUNT ET AL.

PLEADING.—*Demurrer.*—A demurrer to several paragraphs of a pleading, mentioned by number, is a several demurrer to each paragraph.

SAME.—*Evidence.*—It is not error to sustain a demurrer to an answer which sets up material matter admissible as evidence under a general denial pleaded.

SAME.—To support title to land, deeds misdescribing the land and extrinsic evidence to prove such misdescription to have been made by mistake, are inadmissible, when the ground therefor has not been laid in pleading by allegation of the mistake and prayer for reformation of the instrument.

INSTRUCTIONS.—It is error for the court to instruct the jury, as a matter of law as to what the evidence given proves.

PRACTICE.—*Color of Title.*—*Occupying Claimant.*—In an action under the law in regard to occupying claimants, in the absence of a general verdict, it is an essential fact for the jury to find whether the claimant had color of title.

SAME.—*Parties.*—Where land is claimed by several persons, each of whom has put improvements on his own part thereof; *query*, whether all such persons can unite in a proceeding under the law in regard to occupying claimants.

APPEAL from the Elkhart Circuit Court.

DOWNEY, J.—This was a proceeding under the occupying claimant law, 2 G. & H. 285, by the appellees, William Hunt, Henry Rousch, Magdalena Ritter, and David H. Ritter, against the appellant. The complaint alleges that the appellant in this case filed her complaint in the Elkhart Circuit Court against the appellees in this case on the 19th day of November, 1868, for the recovery of the possession of lots numbered ninety-eight and ninety-nine, in Beardsley's first addition to the town of Elkhart; the recovery by her of judgment for the possession of said lots; that on the 9th day of September, 1864, the plaintiffs in this action purchased said lots from

Myron E. Cole, who took possession of them in good faith, and conveyed the same to them for a valuable consideration; that the title so taken and received by them was derived through certain mesne conveyances duly recorded in, etc., as follows: A tax deed from E. W. H. Ellis, auditor, etc., to Michael F. Shuey, dated on, etc.; a deed from said Shuey and wife, to Myron E. Cole, dated on, etc.; and a deed from Cole and wife to Rousch, one of the appellees, dated on, etc.; all of which deeds were duly recorded, and under which the plaintiffs derive their title; that in pursuance of said purchases and conveyance from the said Cole, these plaintiffs took possession of the lots aforesaid, and made lasting and valuable improvements thereon, which improvements were made and possession taken under said conveyance in good faith, without any notice whatever of the title or interest of the plaintiff in the other action, and without any knowledge of any adverse title to said lots; and they state that they are now in the possession of lot number ninety-eight and three and one-half rods off the south part of lot ninety-nine. They then state the improvements which they have made on the last mentioned real estate, and that the same were made while they were in possession of said lands under the conveyance aforesaid, without any notice of the title aforesaid, stating the value of the improvements, the value of the lots without the improvements, and the annual value of the rents and profits without the improvements; wherefore, etc.

There is an apparent inconsistency in the allegations of this complaint with reference to the title of the plaintiffs to the premises in question. It is first stated that Cole conveyed to all the plaintiffs, and then, in the more particular statement of the title, it is said that Cole conveyed to Rousch, one of them. But as no question has been made by counsel as to this, we need decide nothing.

The defendant pleaded,

First. A denial of each and every allegation of the complaint, except that she was the owner of the real estate.

Cain v. Hunt et al.

Second. She admitted that she was the owner of the premises mentioned in the complaint; that she recovered possession thereof as alleged; that lasting and valuable improvements have been made thereon by the plaintiffs during their occupancy thereof; but averred that the plaintiffs were not purchasers of the same in good faith; that at the time they took their title they knew that it was derived through tax sale, which was irregular, invalid, and void; that the same was made without competent authority; that the outstanding title of the defendant was valid, and paramount to the said title so derived through the said tax sale, and must and would prevail over the same whenever insisted upon and enforced; that the plaintiffs were informed at the time when they so took and received their title as aforesaid that the said paramount title of the defendant was then, and theretofore had been, owned by minors under the age of twenty-one years; that the said premises were, and theretofore had been, occupied by their tenants, placed in the possession thereof by their trustee and agent, who was by them instructed and directed to pay the taxes thereon, but who suffered the same to go to sale in default of such payment, and purchased the same in, etc.; wherefore, etc.

The third paragraph of the answer need not be set out in this opinion.

The plaintiffs demurred in this form to the second and third paragraphs of the answer: "Come now the plaintiffs in the above entitled cause of action, and file their separate demurrers to the second and third paragraphs of defendant's answer, for the following grounds of objection, to wit: first, that the said several paragraphs do not state facts sufficient to constitute a defence to plaintiffs' complaint." The demurrer was sustained as to the second, and overruled as to the third paragraph of the answer. Both parties excepted. There was a reply by general denial to the third paragraph of the answer. The issues were tried by a jury, and the jury found, in answer to interrogatories propounded to them, first, that the value of all lasting and valuable improvements

of all kinds made on the lots in question previous to the 19th day of November, 1869, by the plaintiffs, or any of them, was twenty-seven hundred dollars; second, that the damages or injuries which the premises in question had sustained by waste or cultivation to the time of rendering judgment was nothing; third, that the fair value of the rents and profits of said lots which accrued without the improvements to the time of the trial was thirty dollars; fourth, that the rents and profits of said lots had been worth, without any of the improvements placed on them by the plaintiffs, from the time the plaintiffs took possession to the time of the trial, thirty dollars; fifth, that the fair cash value of the lots without any improvements, and in the condition they were in before any improvements were placed on them, was eleven hundred dollars; sixth, that the value of the lasting improvements placed on that portion of the lots in question owned by Ritter, before the 19th day of November, 1868, was nine hundred dollars; seventh, that the amount of the costs recovered by the defendant in her suit to recover the lots in question, and chargeable against the plaintiffs, was forty-five dollars.

Thereupon the defendant moved the court to grant her a new trial, which motion was overruled, and the defendant excepted.

The defendant then moved the court in arrest of judgment, for the reason that the verdict of the jury is contrary to law, and only finds upon a portion of the issues submitted to them and required by the statute to be found, and for the reason that the jury did not find the value of the land without the improvements at that time. This motion was also overruled, and the defendant excepted by bill of exceptions.

The court then rendered judgment as follows:

"It is, therefore, considered and adjudged by the court that the plaintiffs, William Hunt and Magdalena Ritter, are entitled to the sum of two thousand six hundred and twenty-five dollars for the value of their lasting improvements placed upon the said lots described in said complaint; and it

Cain v. Hunt et al.

is further considered and adjudged by the court that the said lots in said complaint mentioned are of the value of one thousand and one hundred dollars, without the improvements thereon. It is therefore ordered by the court that if the said Mary A. Cain shall pay or cause to be paid to said plaintiffs, Hunt and Ritter, within four months from the date hereof the said sum of twenty-six hundred and twenty-five dollars in lawful money, then and in that event the said Mary A. Cain shall be and become the absolute owner of all said lasting improvements on said lots, together with the lots aforesaid, being, etc., and the plaintiff shall set up no claim to the said improvements. It was further adjudged that if said Mary A. Cain fail to pay said sum within said time, then and in that case, if the plaintiffs, Hunt and Ritter, or either of them, should pay, or cause to be paid to her, said sum of eleven hundred dollars within four months after the expiration of the time limited for said Mary A. Cain to pay for said improvements, said lots and all the right, title, and interest of said Mary A. Cain thereto should vest in and become the property of said plaintiffs, or the one paying for the same. It was further ordered that if neither party made such payment within the period of eight months, they should own the lots and improvements thereon in common in the proportion that eleven hundred bears to twenty-six hundred and twenty-five. It was further ordered that the plaintiffs recover of the defendant their costs."

The first alleged error is, that the court improperly sustained the demurrer to the second paragraph of the answer, and it is insisted by counsel for the appellant that the demurrer was in form a demurrer to the second and third paragraphs jointly, and that it could not be sustained to one paragraph, and overruled to the other. The second paragraph did not, we think, set up any material matter not put in issue by the general denial of the complaint. The complaint, as it is required by statute to do, sets forth the grounds on which the plaintiffs in this proceeding sought relief, the value of the improvements on the lands, as well

as the value of the lands aside from the improvements. 2 G. & H. 285, sec. 616. The general denial put all these allegations in issue. The demurrer, we think, under former rulings of this court, may be regarded as a separate or several demurrer to each of the paragraphs. *Aiken v. Bruen* 21 Ind. 137, and cases cited. It having been sustained to the second paragraph, that ruling does not constitute an available error if the matter set up in it was material, the same matter being admissible under the general denial.

The next alleged error is the overruling of the motion for a new trial. Various reasons were assigned for a new trial. Passing over the first and second, which we regard as too general, the third is, that the court erroneously permitted the plaintiffs, upon the trial, to introduce evidence of the fact that the plaintiffs entered upon the premises and land of the defendant and made the improvements in question under deeds not describing the defendant's lands theretofore recovered by her from the plaintiffs in ejectment, and to introduce in evidence explanatory evidence of intention to convey the defendant's lands, notwithstanding the want of such description of the same, etc. The description of the land in the complaint in this case, it will be observed, is this: "Lots numbered ninety-eight and ninety-nine in Beardsley's first addition to the town of Elkhart." The tax deed from Ellis to Shuey designated the lots as "lots ninety-eight and ninety-nine, in the town of Elkhart." The deed from Shuey to Cole designated them as in the town of Elkhart, "as shown by the recorded plat of said town." In the deed from Cole to Rousch and Hunt the lots are described as "in the village of Elkhart, on the original plat of said town." In a deed from Hunter to Lena Ritter, given in evidence, the premises are designated as "part of lot number ninety-eight, in the village of Elkhart," etc.

These deeds were all introduced over the objection of the defendant in this action. The objection to all of them was, that they did not designate the same real estate mentioned in the complaint, and which had been recovered by the

Cain v. Hunt et al.

defendant herein in the action of ejectment. To the last named deed the further objection was made that it was immaterial and irrelevant. Before offering these deeds in evidence, the plaintiff had introduced in evidence, over the objection of the defendant, the plat of the original town of Elkhart, and also the plat of Beardsley's first addition to said town. In the original plat the lots numbered no higher than fifty-three. In the plat of the addition, the numbers commenced with fifty-four and embraced ninety-eight and ninety-nine. Several deeds were introduced in evidence by the plaintiffs showing that in the deeds constituting the chain of title under which the appellant claimed title from Beardsley down, the lots are designated as being in the "village of Elkhart," without mentioning any addition. The introduction in evidence of these deeds was also objected to by the defendant in this proceeding.

Upon this evidence the court instructed the jury, as follows: "The deed from Cole to Rousch and Hunt, read in evidence to you, describes lots numbers 98 and 99, in the village of Elkhart, as the same is designated on the original plat of said town. The plats made by Beardsley in 1832 and 1835 have been read in evidence. By an examination of the first described plat, you will find no lots of the numbers of 98 and 99, but you do find lots number 98 and 99 on the plat made by Beardsley in 1835. This shows that the word 'original,' in the description of the lots described in this deed, is a false description, and may, on that account, be by you rejected, if there is enough left in the description to designate the lots. After rejecting the word original, you may read the description of the lots described in this deed as lots numbers 98 and 99, as the same are designated on the plat of said town. And if after looking over the plats offered in evidence, you find that lots numbers 98 and 99 are found on the plat of Beardsley, made in 1835, called by Beardsley, by this plat, first addition to the town of Elkhart, you may give the deed from Cole to Hunt and Rousch a reading, as follows: Lots numbers 98 and 99 in the village of Elkhart, as

designated on Beardsley's first addition to the town of Elkhart."

It is contended by counsel for the appellees that these rulings of the court, in the admission of evidence, and in the instruction given, are justified by the maxim, *Falsa demonstratio non nocet*. By this is to be understood an erroneous description of a person or thing in a written instrument; according to which it is held that, as soon as there is an adequate and convenient certainty of what is intended, any subsequent erroneous addition will not vitiate it. The maxim applies to statutes, as well as written instruments. The characteristic of the cases falling within the rule is, that the description, so far as it is false, applies to no subject, and so far as it is true it applies to one subject only, and the courts, in these cases, reject no words but those which are shown to have no application to any subject. Smith Com. Constitutional Construction, sec. 506.

On the other hand, it is insisted by counsel for the appellant, that the doctrine has no application to false or incorrect descriptions of the lands in sales for taxes, whether the question arise in the action to recover the lands from those claiming to hold under such sale, or in a proceeding like this to obtain the benefits of the Occupying Claimant Law. It is conceded that the doctrine is properly applied to cases arising between vendor and vendee where intention gives character to the act, and is therefore an element of inquiry.

But it is denied that it can have any application where, as in tax sales, the intention of the owner of the land can have nothing to do with the acts performed, but is wholly wanting. None of the proceedings in the course of the listing, sale, etc., of the land for taxes prior to the deed are in evidence. We do not know by what description it was listed and advertised, except as we may infer it from the deed of the auditor; as the description by which real estate is listed and advertised should be kept up in the certificate and deed, unless when less than the whole of a lot or tract is sold, we may infer that the description in the deed is the same by which it was listed, advertised, and sold.

After some consideration, we doubt whether the maxim, *Falsa demonstratio non nocet*, applies, and have concluded that we must decide this question upon grounds a little different from that discussed by counsel. None of the deeds offered in evidence by the appellees describe the lots as in the first addition of Beardsley to the town of Elkhart, but the inference, if not the clear statement in each of them is, that they are in the original town. The last deed in the chain, that from Cole to Rousch and Hunt, describes them as "in the village of Elkhart, on the original plat of said town." Now, conceding that the evidence furnished by the plats and deeds was admissible, to show that there was a mistake in this deed, we think there should have been some ground shown in the pleadings for the introduction of the evidence. As a general rule, parties cannot introduce evidence except in support of the allegations in the pleadings. Here there was no allegation of any mistake in the deeds, or of any necessity for reforming them. Conceding, as claimed by counsel for the appellant, that the description in the deed from the auditor to Shuey cannot be helped by extrinsic evidence, still the same reason may not prevent the correction of the deed from Cole to Rousch and Hunt, in which the most essential misdescription exists. We think, then, that, as the pleadings stood, the evidence admitted was improperly allowed to go to the jury. If the evidence had been properly admitted, we think the court should have left the force to be determined by the jury, and should not have charged the jury, as matter of law, what it proved.

As we must, for this reason, reverse the judgment, we need not consider the question relating to the verdict, except to say that we think the jury did not find all the essential facts put in issue. They did not find a general verdict, nor did they, in the special findings, find that the plaintiffs had any color of title to, or ownership of, the property. We need not determine whether this objection was properly presented by the motion in arrest of judgment, or whether it should have been raised by a motion for a new venire.

It may be suggested, also, whether, if the property is owned by different claimants, and each has put improvements on his own part, the parties can unite in a proceeding of this kind.

The judgment is reversed, with costs, and the cause remanded, with instructions to allow the plaintiffs to amend their complaint, if they shall desire to do so.

A. S. Blake and R. M. Johnson, for appellant.

T. H. Baker and J. A. S. Mitchell, for appellees.

41	475
124	60
41	475
133	500

ROBERTS ET AL. v. COMER ET AL.

PROMISSORY NOTE.—Attorney's Fees.—Complaint.—Where suit was brought upon a promissory note, which contained an agreement to pay a reasonable fee for the plaintiff's attorney if the note should be collected by suit, it was held not to be a sufficient cause for reversing a judgment which included an allowance for such fee, that the complaint did not state the amount of the fee claimed.

APPEAL from the Blackford Common Pleas.

DOWNEY, J.—The appellees sued the appellants on a promissory note, made by two of them, and indorsed by the other two. The note was for the payment of a sum of money with a reasonable fee for plaintiff's attorney, if the note should be collected by suit. A copy of the note was filed with the complaint.

The defendants answered by a general denial. There was a trial by the court, and a finding for the plaintiffs. The defendant moved for a new trial, on the ground that the court improperly allowed the plaintiffs to introduce testimony, over the objection of the defendants, of the value of the services of the attorney of plaintiffs in the cause, and because the finding of the court was contrary to law. The court overruled this motion, and rendered judgment for the amount of the finding.

 Bonsell v. Bonsell.

The only error assigned is the overruling of the motion for a new trial. As the complaint contains no allegation of the amount of the attorney's fee, it is insisted by counsel for the appellants that it was an error to admit evidence of the amount. Counsel for the appellees insists that, as the note stipulated for the payment of such attorney's fees, and as the amount for which judgment was demanded was large enough to cover the amount of the note, and also of the attorney's fee, there was no error in admitting the evidence.

The court might have allowed the complaint to be amended by inserting an allegation of the amount of the attorney's fees stipulated for in the note, at any time, in its discretion. 3 Ind. Stat. 373, sec. 99. Such an allegation could hardly be regarded as stating a new or additional cause of action. The note, under section twenty-eight of the code, became properly a part of the record, and it therefore appeared upon the record that the defendants had promised to pay the attorney's fees. The defect was the want of an allegation of the amount of such fee. This might have been supplied. It follows, we think, according to section five hundred and eighty of the code, that for this defect the judgment should not be reversed by the court. There is no other ground relied upon for a reversal of the judgment.

The judgment is affirmed, with costs.

W. H. Carroll and *J. T. Wells*, for appellants.

W. A. Bonham, for appellees.

41	476
130	562
41	476
151	533

BONSELL v. BONSELL.

RECORD.—*Appeal.—Complaint.*—The fact that, on an appeal, no complaint appears in the record, but the clerk certifies that "no complaint appears on file," is not a cause for the reversal of the judgment.

AFFIDAVIT FOR PUBLICATION OF NOTICE.—*Sufficiency.*—An affidavit to author-

Bonsell v. Bonsell.

ize publication of notice of a pending proceeding for divorce may be sufficient, although not positive, but as the deponent "is informed and verily believes."

APPEAL.—*Supplemental Record*.—A failure in the record to show notice to the defendant, either by summons or publication, may be supplied by a supplemental record containing such proof.

APPEAL from the Elkhart Common Pleas.

DOWNEY, J.—This was a petition for a divorce by the appellee against the appellant. After notice by publication, she made default, and a divorce was adjudged to him. She appealed, and has assigned several errors.

1. The first is, that there is no complaint in the record alleging any cause for divorce, or any cause of action whatever. It is shown by the record that a complaint was filed, but instead of setting it out, the clerk states, in the record, that "no complaint appears on file." That no complaint is set out in the record is no reason for reversing the judgment.

Collins v. The U. S. Express Co., 27 Ind. 11.

2. The next objection is, that the affidavit on which publication was made is not positive, but only as the deponent "is informed and verily believes." We think this form is in common use. There is no statute requiring it to be positive. See *Trew v. Gaskill*, 10 Ind. 265; *Simpkins v. Malatt*, 9 Ind. 543.

3. It is next urged that there is no evidence of notice in the record, either by summons or by publication of notice. This was true when the error was assigned, but since that time a supplemental record has been filed containing the notice and the proof of its publication. This avoids the objection.

4. It is further urged that there is no evidence in the record to sustain the finding of the court. How could counsel expect to find the evidence in the record of a cause disposed of on default?

5. That the judgment is contrary to law, in this, that there is no finding to support the judgment. This objection is not sustained by the record. There was a finding.

Kerchaval v. The State.

6. Lastly, that the court had no jurisdiction to render the judgment. This does not appear.

From what is shown of this case, outside of the record, it is probably one of extreme hardship. But there is no way in which we can apply a remedy.

The judgment is affirmed, with costs.

J. H. Baker and *J. A. S. Mitchell*, for appellant.

A. S. Blake and *R. M. Johnson*, for appellee.

SANDUSKY v. WEBB ET AL.

APPEAL from the Sullivan Circuit Court.

PETTIT, C. J.—The paper which purports to be a transcript of the record below is not under the seal of any court, and we cannot, therefore, take notice of it, or entertain jurisdiction of the case.

The appeal is dismissed, at the costs of the appellant.

J. M. Hanna, *J. M. Allen*, and *W. Mack*, for appellant.

S. Coulson, for appellees.

KERCHAVAL v. THE STATE.

APPEAL from the Hamilton Common Pleas.

PETTIT, C. J.—The transcript is not verified by the seal of the court below, nor is there any assignment of error of which we can take notice, the assignments being only causes for a new trial in the court below, and there being no assignment for overruling a motion for a new trial.

The appeal is dismissed, at the costs of the appellant.

D. Moss and *F. M. Trissal*, for appellant.

J. C. Denny, Attorney General, for the State.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1873, IN THE FIFTY-SEVENTH
YEAR OF THE STATE.

GRAND RAPIDS AND INDIANA RAILROAD COMPANY *v.* HORN
ET AL.

41	479
142	249
41	479
149	179
41	479
168	243

PRACTICE.—*Reason for New Trial.*—*Motion for Judgment on Special Finding.*—The inconsistency of a special finding with the general verdict is not a reason for a new trial. The question is presented by a motion for judgment on the special finding.

RAILROAD.—*Appropriation of Land.*—*Damages.*—Where a railroad sought to appropriate land for the line of its road, the court refused to give this charge to the jury: "That the plaintiff is entitled to recover in damages only the actual damage suffered by the plaintiff in consequence of the appropriation of the land by the defendant, the railroad company, for the right of way, and such injuries as directly result from such appropriation."

Held, that the charge was properly refused, as it did not include any allowance by the jury for the fencing made necessary, and for the overflowing of other parts of the land caused by the embankments, and for the throwing of earth upon the land, and for excavations for earth made outside of the strip appropriated; there being evidence on these matters. The proper elements to be considered in estimating the damages are stated in a charge set out in the opinion.

SAME.—*Benefit Set Off Against Special Damage.*—The court also refused to charge as follows: "If you should find from the evidence that by the con-

The Grand Rapids and Indiana Railroad Company *v.* Horn *et al.*

struction of culverts and drains through and along the road embankments over the plaintiff's land, the defendant (the railroad company) has, in this way, to some extent, drained the plaintiff's land, or rendered its drainage more easy and less expensive, such benefit, if any, may be considered in estimating the plaintiff's damage."

Held, that the charge was properly refused, as the benefit was not limited to meet the damage resulting from the overflow of water caused by the fills and embankments made by the railroad company.

PRACTICE.—Instruction.—Evidence.—Where evidence on a question of damage has been ruled out on the trial, it is unnecessary for the court to instruct the jury to disregard it.

SAME.—Jury.—Instruction.—It is not error in the court to refuse to instruct the jury upon matters of known duty; as, that they should decide the case before them on the evidence, without prejudice, partiality, or favor.

SAME.—Open and Close.—Where the only question submitted to the jury was the amount of damages, the opening and close of the case was properly given to the party claiming the damages.

APPEAL from the Allen Circuit Court.

DOWNNEY, J.—This was a proceeding by the appellant against the appellees to appropriate certain real estate of the appellees to the use of the company for the construction of its road, commenced by the filing of the proper instrument of appropriation, under section fifteen of the act for the incorporation of railroad companies. 1 G. & H. 509. In the record the appellees are spoken of as the plaintiffs, and the appellants as the defendants. Assessors were appointed, and they made a report, to which exceptions were filed. Afterward the parties agreed that the assessment should be set aside, and that a new assessment of damages should be made by a jury in the circuit court. It was also agreed that all questions involved and all irregularities should be waived, except only the question as to the quantum of damages. There was then a trial by jury, and a general verdict for the plaintiffs in the sum of twenty-six hundred dollars, the jury returning also numerous answers to interrogatories propounded by each party. The company moved the court for a new trial, which was overruled, and final judgment rendered for the amount of the verdict. The error assigned is the overruling of the motion for a new trial.

The first and third reasons for a new trial raise the ques-

tion as to the sufficiency of the evidence to sustain the verdict of the jury, and the second is that the verdict is contrary to law. We have examined the record with reference to these objections, and are of the opinion that they are not well founded. The testimony is in many respects conflicting, the witnesses differing with reference to the facts and estimates of values. It is claimed in this connection, by counsel for the appellant, that the new trial should have been granted, because the special findings of the jury are inconsistent with the general verdict as to the amount of the damages. But we think this position cannot be sustained. The inconsistency of the special findings of the jury with the general verdict is not a reason for a new trial. When such is the case, the proper way in which to present the question is by a motion for judgment on the special findings. 2 G. & H. 206, sec. 337. *Morse v. Morse*, 25 Ind. 156.

The fourth reason for a new trial is that the court, after having been requested to reduce its charges to writing, gave oral charges and modifications of charges. We find no foundation for this objection in the record. The point is not mentioned in the brief of counsel for the appellant.

The fifth reason relates to the charges refused by the court, numbered one, two, three, four, seven, eight, and nine. We shall examine particularly only such of these charges as are referred to by counsel for the appellant in their brief. In the first of these charges the court was asked to say to the jury, "that the plaintiff is entitled to recover in damages only the actual damage suffered by the plaintiff in consequence of the appropriation of the land by the defendant for the right of way, and such injuries as directly result from such appropriation." etc. This charge, if given, would have excluded any allowance by the jury for the fencing made necessary by the running of the road through the plaintiffs' land, the overflowing of other parts of the land from the fills or embankments made, the removal of tree tops and earth thrown on the land, and excavations for dirt made out-

The Grand Rapids and Indiana Railroad Company v. Horn *et al.*

side of the strip of land appropriated, matters concerning which there was much evidence on the trial. For this reason it seems to us that the charge was properly refused by the court.

The fourth charge asked and refused is as follows: "If you should find from the evidence that by the construction of culverts and drains through and along the road embankments over the plaintiffs' land, the defendant has, in this way, to some extent, drained the plaintiffs' land, or rendered its drainage more easy and less expensive, such benefit, if any, may be considered in estimating the plaintiffs' damages."

It is claimed that this charge should have been given because one of the items of damages claimed by the plaintiffs was the alleged overflowing of a part of their land from the accumulation of water caused by fills or embankments made by the company, and that evidence that by the construction of the culverts and drains through the plaintiffs' land, the same have been drained, or made more easily drained, was admissible to meet that claim of the plaintiffs. But the charge does not stop there. If it had, it is probable the court would not have thought it necessary to refuse it. As asked, it authorized the jury to deduct such supposed benefit from any damage of the plaintiffs from whatever cause it might have arisen. The statute expressly forbids this, by declaring that, "in estimating any damages under this chapter [article], no deduction shall be made for any benefit that may be supposed to result to the owner, from the contemplated work." 2 G. & H. 316, sec. 711, and see *The Evansville, etc., R. R. Co. v. Fitzpatrick*, 10 Ind. 120; *The White Water Valley R. R. Co. v. McClure*, 29 Ind. 536.

By the seventh instruction refused, the court was requested to charge the jury that any evidence that might have been introduced tending to show the destruction of the plaintiffs' crops of grain or grass, by reason of cattle's getting in and destroying or injuring the same through the removal of fences by the defendant, had been ruled out, and that they

should not consider, or assess or allow any damages for such injury, if such injury had been sustained.

The court did say to the jury, in the charge given on its own motion, that "injury to crops or grass done by trespassing animals, which may have obtained an entrance to the fields of the plaintiffs by reason of the fences being carelessly or negligently left open, will not be considered." It is insisted that this part of the charge of the court does not supply the place of that asked by the defendant, because it is left open to the inference that the carelessness and negligence alluded to by the court was only that of the plaintiffs, and thus the jury might consider themselves at liberty to allow for such damages resulting from the carelessness and negligence of the defendants. Assuming that such damages could not be computed in such a case, which we need not decide, it must be remembered that this evidence had been excluded by the court, and was not before the jury. It ought to be supposed that the jury would not act upon evidence which had been ruled out or excluded, without any charges to that effect by the court. But it does not appear that the plaintiffs had left the fields open, and hence we cannot suppose that the instruction of the court had any reference to them. There is surely nothing in this objection for which the judgment ought to be reversed.

The ninth of the charges asked by the defendant, which was refused, is as follows: "In this case the jury should, without regard to the parties, look alone at the evidence, and render such a verdict as, in their judgment, the evidence may require, without prejudice, partiality, or favor."

Counsel for the appellant say of this charge: "It may be said, and perhaps truly, that every juror in the panel well knew that his duty was to decide impartially; but, it is equally true, that the best of men need to be continually reminded of their well known duties. Such a reminder, from the court, at that time, would have been, to every honest juror, a sort of a second conscience causing a self-examination, which might have been of the utmost impor-

The Grand Rapids and Indiana Railroad Company *v.* Horn *et al.*

tance to the parties. But our right to this charge, in our view, is so plain as to need no argument."

We think counsel have correctly anticipated the objection which may be made to the charge, and what may be said in support of the ruling of the court in refusing to give it to the jury. There are some things that must be taken as true in judicial as well as in other investigations. We think it fair to presume that jurors in any part of the State of Indiana are sufficiently intelligent to know that their duty, when sworn as such, requires them to decide the case according to the evidence, and without prejudice, partiality, or favor, and that the court cannot be said to have committed an error in not reminding them of that duty.

It is next alleged, as a sixth reason, that there was error in the charge given by the court on its own motion. The charge was as follows: "Under the rules of the law and the agreements made by the parties in your presence, written and oral, in reference to that matter, the only question submitted for your consideration in this case is the amount of damages which have accrued and will accrue to the plaintiffs, by reason of the construction of the railroad of the defendant through the land of the plaintiffs. These rules of the law, in connection with the agreements of the parties entered into in this particular case, fix the measure of these damages. The measure of damages, as thus fixed, is the actual value of the strip of land appropriated by the railroad company, together with just and fair compensation for any injury to the residue of the land owned by the plaintiffs from which it is taken, naturally resulting from the appropriation and the construction of the road thereon, such as cutting the fields into an inconvenient and ill shape, destroying or interfering with the convenience of water for stock to a portion of the farm, the cost of constructing and maintaining additional fences made necessary for the proper use and enjoyment of the farm by reason of the construction of the road thereon, the interruption of the flow of surface water on the plaintiffs' own land, and of water in its natural

and accustomed channels, whereby an overflow of adjacent lands results, the proper compensation for any inconvenience occasioned by the interruption of the natural facilities for passage to and fro between different parts of the land owing to the severance thereof by the railroad track, and the fences which may be constructed along the same, the expense of removal of earth, tree tops, or other refuse thrown out upon the adjacent land in the process of construction. These and all other matters affecting, naturally, the enjoyment and use of the property, and resulting as a legitimate consequence of the construction of the road, are all proper to be considered in estimating the damages to be assessed." The residue of the charge, relating to damages from trespassing animals, has been copied above.

No particular objection to this charge is mentioned by counsel for the appellant. It seems to us to be correct.

Seventh. Objection is made to a charge said to have been given by the court at the instance of the plaintiffs. But we find, on reference to the bill of exceptions, that it states only that the charge was asked, and does not state that it was given by the court. Under these circumstances we cannot say that it was given, and need not decide whether it was correct or not.

Eighth. The last reason urged is that the court awarded the open and close to the plaintiffs, the appellees. By the agreement of the parties, the assessment which had been made was set aside, and it was agreed that all other questions were waived, and that the amount of the damages was the only question to be determined. We are not willing to say that it was error to allow the appellees to open and close. Substantially they had the affirmative. We are referred by counsel for the appellant to *The Evansville and Crawfordsville Railroad Co. v. Miller*, 30 Ind. 209, as an authority in favor of their position. We apprehend that counsel are mistaken as to the bearing of the authority. The case is against them. They also refer to *Daggy v. Coats*, 19 Ind. 259; but we find nothing in the case relating to the question under

O'Brien *et al.* v. Flanders.

consideration. There was no error in this ruling. *Fetters v. The Muncie National Bank*, 34 Ind. 251; *The Baltimore and Ohio Railroad Co. v. McWhinney*, 36 Ind. 436.

The judgment is affirmed, with five per cent. damages and costs.

R. Brackenridge, J. Brackenridge, J. Morris, W. H. Coombs, and W. H. H. Miller, for appellant.

W. G. Colerick and H. Colerick, for appellees.

O'BRIEN ET AL. v. FLANDERS.

PROCEEDING SUPPLEMENTARY TO EXECUTION.—*Parties.*—*Residence.*—Where in a proceeding supplementary to execution, the defendant resided in the county where the judgment was obtained and the supplementary proceeding was had;

Held, that a national bank situated in another county might be made a party and required to answer as to funds of the defendant held by it, under section 33 of the code.

BILL OF EXCEPTIONS.—*All the Evidence.*—The words, "this is all the testimony given in the cause," in a bill of exceptions, were held sufficient to show that all the evidence given in the cause was contained therein.

PLEDGE.—A person cannot be deprived of the benefit of collaterals or their proceeds, deposited to secure indebtedness to him, except upon a discharge of the indebtedness.

APPEAL from the Hamilton Common Pleas.

WORDEN, J.—This was a proceeding supplementary to execution, by the appellee against the appellants.

The affidavit on which the proceeding was based alleged, in substance, that one Robert L. Wilson had recovered a judgment in that court against the said O'Brien as principal, and the appellee as surety, and that said Wilson had assigned and transferred the judgment to the appellee, which remains unpaid, etc.; that an execution had been issued upon the judgment and returned "*nulla bona*," and that the bank held

moneys, rights, credits, and effects of said O'Brien, with which the judgment might be paid. Demurrer to the affidavit overruled, and exception. Issue, trial by the court, finding and judgment for the plaintiff, a motion for a new trial having been overruled, and exception taken.

The judgment of Wilson against O'Brien and Flanders was rendered in Hamilton county, in which O'Brien resided, and to the sheriff of which the execution issued. The bank was located in Marion county, and the point made on the demurrer is, that the bank could not be compelled to litigate in Hamilton county, but could be sued only in the county in which she was located. This objection is not, in our opinion, well taken. O'Brien was a necessary party to the proceeding. *Wall v. Whisler*, 14 Ind. 228. He being a necessary party and residing in Hamilton county, we think, under the provisions of section 33 of the code, 2 G. & H. 58, the bank was liable to be sued with him in that county. There is a question involved in the case that may admit of some controversy, which is, whether the assignment of a judgment by the plaintiff therein, to the defendant therein who is a surety, will leave the judgment in force against the principal, and enable the surety to issue execution thereon for his benefit against the principal, in the same manner as if the surety had paid the judgment. 2 G. & H. 309, sec. 676. No point is made in this respect by counsel, and we express no opinion upon it. We mention it merely that it may not be deemed to have been passed upon.

The evidence is in the record. The bill of exceptions, after setting out the evidence, states that "this is all the testimony given in the cause." It is objected by the counsel for the appellee that this is insufficient, and authorities are cited in support of the objection. Under a former rule of this court (see 14 Ind. ix., Rule 30,) which provided, that "in every bill of exceptions, purporting to set out the evidence, upon motion for a new trial overruled, the words 'this was all the evidence given in the cause,' are to be regarded as technical, and indispensable to repel the presumption of other

O'Brien *et al.* v. Flanders.

evidence," the objection would doubtless have been well taken. But that rule has been rescinded, and the authorities under it are, therefore, inapplicable. The language employed in the bill of exceptions, in this case, sufficiently shows that all the evidence given in the cause is contained therein.

The following facts may be gathered from the evidence: At the time of the commencement of this proceeding, O'Brien owed the bank on notes about four thousand dollars. He had deposited with the bank, as collateral security for the payment of this indebtedness, several promissory notes against third persons. The bank had collected on these collaterals some money, and gave O'Brien credit on their books for the sum of nine hundred and eighty-three dollars and thirty-five cents. The indebtedness of O'Brien to the bank remained unpaid, and the bank refused to pay over to him the money thus collected, until he paid or satisfactorily arranged his indebtedness to the bank. The money thus collected by the bank and standing to the credit of O'Brien, was ordered by the court to be paid over to the appellee on his judgment.

This judgment cannot be maintained. The bank could not be legally deprived of the benefit of the collaterals thus placed in her hands, or of the money collected by her thereon, until the indebtedness of O'Brien to her was paid or otherwise arranged. There are some other questions made in the case, but we need not notice them, as the judgment will have to be reversed, for the reason above stated, if for no other. A new trial should have been granted.

The judgment below is reversed, with costs, and the cause remanded.

W. O'Brien and R. Graham, for appellants.

D. Moss and F. M. Trissal, for appellee.

MILLER v. BILLINGSLY.

CONTRACT.—For Benefit of Third Person.—Where A. delivers a sum of money to B. on his promise to deliver the same to C., as a gift from A., the money may be recovered from B., on his refusal to deliver it, by C., in an action for money had and received to his use.

SAME.—Law and Equity.—Rule Under the Code.—Trustee.—In actions at law, privity of contract is essential; the rule is otherwise in equity, and the systems being blended in this State, a party, not known as a contracting party, but for whose benefit the contract was made, may maintain a suit to enforce the contract under the code, even although ignorant of the contract at the time when it was made, if when informed thereof he accept its provisions. The party receiving the money is treated as a trustee for the beneficiary.

INTEREST.—Breach of Trust.—Interest is properly allowed where there has been a gross breach of trust.

PRACTICE.—Assignment of Error.—Where no demurrer has been filed to an amended complaint, its sufficiency can only be questioned on appeal by a proper assignment of error.

APPEAL from the Dearborn Common Pleas.

BUSKIRK, J.—This was an action by the appellee against the appellant for money had and received.

The only valid assignment of error is based upon the refusal of the court to grant a new trial.

The facts, as proved upon the trial, are these: Baily G. Hayes, in 1869, gave to the appellant a draft upon a firm in Cincinnati, Ohio, for either one thousand or eleven hundred dollars, and directed him, when he received the money, to pay to Baily Hayes one hundred dollars, to Hayden Miller one hundred dollars, to the appellee five hundred dollars, and the balance he was to have as a loan. The appellant, upon receiving the draft, undertook and agreed with the said Baily G. Hayes to pay and deliver the said sums of money to the persons named. The appellant, in a few days after receiving the said draft, drew the money thereon and paid to Baily Hayes and Hayden Miller each one hundred dollars. Baily G. Hayes and the appellee were half-brothers, and had not seen each other for over twenty years. The money sent to the appellee was intended as a gift. The appellant was directed, when he delivered the money to the appellee, to say,

41	489
127	590
41	489
129	130
41	489
136	389
41	489
153	404
41	489
156	422
41	489
180	643
180	644

to him that it was sent to him as a present from his half-brother. The appellant failed and neglected to deliver the said money to the appellee; nor did he inform him that he had received the same for him. The appellee did not, for about two years after the same had been sent, know that the money had been so sent to him. He had not heard of it until after the death of Baily G. Hayes. When he was informed by the widow of the said Hayes that the money had been so sent, he called upon the appellant and asked him if Baily G. Hayes had not sent by him five hundred dollars. The appellant, at first, refused to answer, but finally he admitted that it had been so sent, and when the same was so demanded of him, he refused to pay it. We have thus stated the facts as proved upon the trial by the witnesses of the appellee.

The appellant was examined as a witness on his own behalf, and testified to Baily G. Hayes' giving him the check for a thousand dollars, with directions, when he received the money, to give to Baily G. Hayes one hundred dollars, to Hayden Miller one hundred dollars, to the appellee four hundred dollars, and the balance he was to retain as a loan; that he agreed to deliver the money to Baily Hayes and Hayden Miller, but refused to deliver the money to the appellee; that he offered to give his note to Mr. Hayes for the whole amount, which he refused to take; that it was finally agreed between them that he was to draw the money on the draft, and to retain in his possession the portion intended for the appellee, until Mr. Hayes came up, when he himself would deliver the money to the appellee; that he drew the money on the draft and delivered one hundred each to Baily Hayes and Hayden Miller; that Baily G. Hayes did not come to Dearborn county, but died soon afterward; and that he had never informed the appellee that said money had been sent to him, nor had he ever paid the same to the appellee or returned it to Mr. Hayes, or to any one for him.

It is very obvious to us, from the verdict, that the jury disbelieved the testimony of the appellant, so far as it dif-

ferred from the testimony of the other witnesses. We think the very decided weight of the testimony was with the plaintiff, and that the verdict of the jury was not only supported by the evidence, but that the jury was imperatively required by the weight and force of the evidence to find as they did.

The question presented for our decision is, whether the plaintiff, upon the facts of the case, was entitled to maintain an action for money had and received to his use and benefit. The position assumed by counsel for appellant is, that the contract and agreement was between the appellant and Baily G. Hayes, and that the promise of the appellant was made to the said Hayes, and not to the appellee; and that, as there is no privity of contract between the appellant and appellee, the action cannot be maintained.

The appellant is not without authority to support his position. There are four decisions of this court sustaining the doctrine contended for. *Salmon v. Brown*, 6 Blackf. 347; *Farlow v. Kemp*, 7 Blackf. 544; *Britzell v. Fryberger*, 2 Ind. 176; *Conklin v. Smith*, 7 Ind. 107.

The above cases were actions at law, and the decisions were based upon the doctrine, that at law a promise by one to another, for the benefit of a third party, could not be enforced by the latter. But the rule in equity was always different. In the case last cited, the court adhered to the former rulings of this court with great reluctance. It was admitted that such decisions created a great hardship, and were in conflict with the decisions of other states, and the principles laid down by elementary writers.

In the subsequent case of *Bird v. Lanius*, 7 Ind. 615, the equity rule was recognized as being in force in the State, and it was held that a promise by one to another, for the benefit of a third party, could be enforced by the latter.

The decision in the above case has been uniformly and closely adhered to in all subsequent decisions. *Ball v. Silver*, 17 Ind. 539; *Cloud v. Moorman*, 18 Ind. 40; *Day v. Patterson*, 18 Ind. 114; *Lamb v. Donovan*, 19 Ind. 40; *Shucraft v. Davidson*, 19 Ind. 98; *Ellston v. Scott*, 19 Ind. 290; *Beals*

v. *Beals*, 20 Ind. 163; *Devol v. McIntosh*, 23 Ind. 529; *Cross v. Truesdale*, 28 Ind. 44; *Davis v. Calloway*, 30 Ind. 112; *Marlett v. Wilson's Ex'r*, 30 Ind. 240; *Mathews v. Ritenour*, 31 Ind. 31; *Jagua v. Montgomery*, 33 Ind. 36; *Ritenour v. Mathews*, 34 Ind. 279.

In actions at law, privity of contract is essential, but the rule is, and always has been, different in equity; and the rule should be regarded as settled in this State, that a party, not known as a contracting party, for whose benefit the contract was made, may maintain a suit upon it in equity. Under our code of procedure, the plaintiff is entitled, on bringing his action, to whatever relief either law or equity would have afforded him, on the case made, before the distinction between them, in practice, was abolished. The two systems are blended together, and either legal or equitable rights are to be enforced in the "civil action" provided for. *Potter v. Smith*, 36 Ind. 231; *Frenzel v. Müller*, 37 Ind. 1.

In the above cases, the person making the promise, or receiving the money or article, is treated as a trustee for the person for whose benefit the promise was made, or for whose use the money or article of value was received. It is not necessary that the person for whose benefit the promise was made should have been aware of the promise when it was made. It is sufficient if such person, when informed thereof, accepts of, and acts upon, such promise. If he repudiates the benefit intended, he waives any right to enforce the promise.

It is claimed by counsel for appellant that the damages are excessive. We do not think so. The facts in the case conclusively show that the appellant was guilty of a gross and inexcusable breach of trust, and it was eminently proper for the jury to allow interest.

Counsel for appellant have discussed with much ability the sufficiency of the first paragraph of the complaint. The question is not in the record. A demurrer was sustained to the original first paragraph of the complaint, and it was amended. There was no demurrer filed after the amend-

The Indianapolis, Bloomington, and Western Railway Company v. Beaver.

ment. It is now the settled practice that the want of jurisdiction of the court over the subject of the action, and the sufficiency of the facts in the complaint, may be presented for the first time in this court, but to authorize us to consider such questions, it must be assigned for error here, either that the court below did not possess jurisdiction of the subject of the action, or that the facts stated in the complaint were not sufficient to entitle the plaintiff to maintain the action.

But, conceding that the first paragraph of the complaint was bad, we could not, for that reason, reverse the judgment. The second paragraph was the common count for money had and received, and under that all the evidence that was admitted on the trial would have been admissible.

We have not been able to discover any error in the record.

The court committed no error in overruling the motion for a new trial.

The judgment is affirmed, with costs, and ten per cent. damages.

N. S. Givan and ——— *Matthews*, for appellant.

F. Adkinson and *G. M. Roberts*, for appellee.

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166	345

THE INDIANAPOLIS, BLOOMINGTON, AND WESTERN RAILWAY COMPANY v. BEAVER.

RAILROAD.—*Freight Train*.—*Passenger*.—Where a person was travelling on a railroad, in a caboose car, in charge of his stock and furniture, and an entry in reference to him had been made on the way-bill by the assistant superintendent, thus: "a man in charge," he was a passenger, and was entitled to all the rights and remedies of a passenger, though perhaps not entitled to the use by the company of all the appliances for the safety of passengers that would be used on passenger trains. But in whatever class of cars a railroad company undertakes to convey its passengers, its duty is to so manage such train that passengers shall not by its own carelessness be killed or injured.

The Indianapolis, Bloomington, and Western Railway Company v. Beaver.

SAME.—*Freight Train Carrying Passengers.—Duty of Company.*—Where a railroad company carries for hire, in a caboose car on a freight train, all passengers that apply, it becomes to some extent a passenger train, and the company is bound to use such safeguards for the protection of its passengers as science and skill have devised, and such as experience has proved to be efficacious in accomplishing their object on such a train. Slight care is not sufficient. It is bound to employ all the means reasonably in its power to prevent accidents and protect passengers.

SAME.—*Instruction to Jury.—Public Policy.*—In an action against a railroad company for an injury to the plaintiff while a passenger, resulting from the negligence of the defendant, an instruction, that public policy demands that the law should be applied as rigidly to railroad companies as to any other species of common carriers, is not calculated to mislead the jury.

SAME.—*Evidence.—Negligence.—Accident.—Instructions.*—In such an action, the court instructed the jury, that the plaintiff was not bound to prove more than enough to raise a presumption of negligence on the part of the defendant and resulting injury to himself; and the court also instructed that it was incumbent on the plaintiff to show to the satisfaction of the jury, by a preponderance of the evidence, some carelessness or neglect on the part of the railroad company, which resulted in the injury of the plaintiff; that if the injury was the result of an accident which ordinary prudence could not have prevented, the defendant was not liable to the plaintiff for anything.

Held, that if there was any error in these instructions, it was fully corrected by one given at the instance of the defendant, that the railroad company was only bound to exercise ordinary prudence to prevent the injury; and that if the jury believed from the evidence that the defendant was not guilty of negligence, the plaintiff could not recover; and that negligence consisted in not doing those things which a reasonable man in managing his own property would have done, under the circumstances shown in the evidence, or in doing those things which a reasonable man would not have done in managing his own property, under the circumstances shown in the evidence.

PRACTICE.—*Reason For New Trial.*—A statement of a reason for a new trial, that the court erred in admitting evidence in behalf of the plaintiff over the defendant's objection, is too general.

APPEAL from the Montgomery Common Pleas.

OSBORN, C. J.—The appellee complained of the appellant, and alleged that he was a passenger on the road of the appellant, and whilst such passenger and riding in a car of the company, by the negligence and carelessness of the servants, agents, and employees in charge of the train and car in which he was riding, and without his fault, the car was thrown from the track and overturned, and by means thereof he was greatly injured; that he was put to great expense for

The Indianapolis, Bloomington, and Western Railway Company *v.* Beaver.

medical attendance, etc. The complaint contains four paragraphs. We do not consider it necessary to set out the averments of the different paragraphs. The purpose of the pleader was to vary the statements so as to cover the case which might be made by the evidence. The appellant filed separate demurrers to each paragraph of the complaint, which were overruled; but as no error is assigned for overruling the demurrers, we need not notice them.

An answer was filed in three paragraphs; first, the general denial; second, that the appellee was not a passenger as alleged in his complaint; third, the appellant was carrying the appellee at his special request, free of charge, upon a regular freight train, upon which all passengers were forbidden to ride, of which he had notice; that at his special request the company agreed to carry him free, in consideration that he would, and did, agree to release the appellant from all risks of personal injury, and from all damages arising thereupon on account of any error or default by the appellant.

A motion to strike out the second paragraph was made and sustained, and a demurrer was filed and overruled to the third, to which the appellee then filed a reply. There was a trial by jury, and verdict for the appellee for seven hundred and fifty dollars. Motion for a new trial overruled, exceptions, and final judgment on the verdict.

The causes stated in the motion for a new trial were, first, because the damages were excessive; second, because the verdict was not sustained by sufficient evidence, and was contrary to law; third, error of law occurring at the trial and excepted to by the defendant, in this, that the court erred in giving to the jury the instructions asked by the plaintiff, and in refusing to give the instructions asked by the defendant; and, further, that the court erred in excluding evidence offered by the defendant, and in admitting evidence in behalf of the plaintiff over defendant's objection.

There are six errors assigned, all of which are covered by

The Indianapolis, Bloomington, and Western Railway Company *v.* Beaver.

the second, that the court erred in refusing to grant the motion for a new trial.

The appellant asked the court to give the following instruction: "To entitle the plaintiff to exemplary or punitive damages, in this case, the jury must be satisfied that the injury resulted from negligence, and not from accident. If the jury believe from the evidence that the injury was the result of simple accident, without wilful negligence, the measure of plaintiff's damages would be his actual loss and expense resulting from the injury inflicted by defendant; and in considering this matter, you will allow the plaintiff nothing for any injury or ailment that may have resulted from bad treatment by a physician, or from the want of proper attendance on the part of the plaintiff himself;" which was refused.

The instruction must be considered as an entirety. It does not undertake to exclude punitive damages only; but it asks to limit them to the "actual loss and expense resulting from the injury," to exclude all damages arising from pain and suffering. We think in cases of this kind the injured party may be entitled to some damage on account of the pain and anguish suffered in consequence of the injury sustained. What such damage ought to be is for the jury to determine from the evidence, under proper instructions from the court. We do not understand that the jury possess an unlimited discretion to allow excessive and extravagant damages, but only such as are reasonable and proper, and as will fairly compensate the party suffering. They must be governed as in other cases where the damages are not liquidated and cannot be determined by calculation. No exact or precise rule can be laid down, to be followed in all cases, for fixing the amount. The facts in each case will enable the jury, under proper instructions, to determine them.

The instruction also directed the jury not to allow the plaintiff anything for any injury or ailment that may have resulted, not only from bad treatment of the wounds by a physician, but also from the want of proper attendance on

The Indianapolis, Bloomington, and Western Railway Company *v.* Beaver.

the part of the plaintiff himself, although the court had already instructed the jury, that "the defendant was not liable for any damages resulting to plaintiff from his own want of proper care and treatment of the wound." On motion of the appellant the jury were also instructed that the defendant would not be liable for any aggravation of the plaintiff's injury that may have resulted from improper treatment on the part of the surgeon who dressed it, or from want of proper care and attention on the part of the plaintiff himself after the wound was dressed; that he could not recover from the railroad company for any injury that might have resulted from his own want of care, skill, and attention to his injury; that the plaintiff must prove to the satisfaction of the jury, by a preponderance of the evidence, that the diseased condition of the limb arising subsequent to the injury was the natural result of the original injury, and not the result of improper treatment and a want of due care on the part of the plaintiff himself, or on the part of the physician who dressed the wound. The instructions which the court had given to the jury contemplated and recognized compensatory, and not punitive, damages, as the rule by which they were to be governed.

The appellant discusses at considerable length the instructions given to the jury relative to the obligations of the company in carrying the appellee as a passenger, and the safeguards that were necessary to be used for his protection from injury; and an effort is made to distinguish and limit the obligation and care of the company when the passenger is carried in a caboose car attached to a freight train in which passengers are not regularly carried. It is insisted that the same care is not required as when the passenger is carried in a passenger car and passenger train. We will not stop to discuss that question in this case. The proof is conclusive that in the car and train in which the appellee was travelling at the time of the injury, passengers were carried, the same as on regular passenger cars and trains; that they were

The Indianapolis, Bloomington, and Western Railway Company v. Beaver.

allowed to travel without objection, and that regular fare was collected from them. And it is just as conclusively established by the evidence, that the car in which the plaintiff was riding, by the consent and direction of the proper agents of the appellant, was thrown from the track and overturned through the carelessness of the company, whereby the appellee received the injury complained of, without fault on his part. Under such circumstances, we think it unnecessary to discuss or consider the comparative care required in carrying passengers on freight and passenger trains.

The appellee had contracted for the transportation of stock and furniture to a point on the line and on a portion of the road of the appellee. He was travelling with, and in charge of, his property.

Before starting from Indianapolis, he told the agent of the company that he wanted to go with his stock; the assistant superintendent directed the agent to enter on the appellee's way-bill, "a man in charge." With that authority he rode in the caboose car attached to the train in which his stock was being transported. We think he was a passenger and entitled to all the rights and remedies belonging or incident to passengers. He could not expect the same comforts that he would enjoy in a passenger car, and perhaps not all the appliances used for the safety of passengers on passenger trains. But whether a railroad company undertakes to convey its passengers on a freight or passenger train, in a caboose or well cushioned car, its duty is to so run and manage the train that passengers shall not by its own carelessness be killed or injured.

The charge complained of is as follows: "While railroads are not bound to assure the absolute safety of their passengers, they are required to make use of such safeguards for the protection of their passengers as science and art have devised, and such as experience has proved to be efficacious in the accomplishing of their object. It is not sufficient that they exercise slight or common care; they have discharged their duty only when they have employed all the means

The Indianapolis, Bloomington, and Western Railway Company v. Beaver.

reasonably in their power to prevent accidents." The appellant insists that the charge is not applicable to a case where the passenger is riding in a caboose. He says, the passenger "takes the caboose as he finds it, and must put up with all its deficiencies and inconveniences and want of safeguards; that he must take all the risks incident to the mode of travel and the character of the means of conveyance that he selects, the parties furnishing the conveyance being only required to adopt the proper care, vigilance, and skill to that particular means; * * * that the passenger can only expect such security as the mode of conveyance affords."

When properly understood and applied to the evidence in this case, we do not think the instruction at all in conflict with the position assumed by the appellant. The company were carrying passengers on the train and in the caboose in which the appellee was riding. It was to some extent a passenger train. It was one upon which they carried for hire all who chose to ride. They were bound to use such safeguards for the protection of their passengers as science and art had devised, and such as experience had proved to be efficacious in accomplishing their object on such a train. Nor was slight care sufficient. They were bound to employ all the means reasonably in their power to prevent accidents and protect their passengers.

In the case at bar, the accident did not happen by reason of any defect in the machinery, cars, or locomotive. In backing the train, the caboose was thrown from the track, and turned over on its side, and the appellee received the injury complained of. The jury, to an interrogatory, "what neglect, if any, were the defendants guilty of, that produced the injury complained of by the plaintiff?" answered, "neglect to throw off the brake on the caboose when the train was backed." The appellant did not adopt the proper care, vigilance, and skill to the means of conveyance used. We are referred to *The Chicago, etc., R. R. Co. v. Hazzard*, 26 Ill. 373. The court, in that case, on page 381, said: "The

The Indianapolis, Bloomington, and Western Railway Company *v.* Beaver.

employees are held to as strict accountability in the management of a train with a caboose attached, as the law imposes in the transportation of passengers in cars specially provided for such purpose."

The appellant also contends that the eighth instruction was erroneous, tending to mislead the jury. It is as follows: "Public policy demands that the law should be applied as rigidly to railroad companies as to any other species of common carriers." We are at a loss to see how it could mislead the jury. It states the law, and whilst, perhaps, there would have been no error in refusing to give the instruction on the ground that it was a mere abstract proposition, still, we think, it could do no harm.

The appellant also complains of the ninth instruction, that the plaintiff was not bound to prove more than enough to raise a presumption of negligence on the part of the defendant and of resulting injury to himself; but on motion of the appellant, the court gave a further instruction, that it was incumbent "on the plaintiff to show to the satisfaction of the jury, by a preponderance of the evidence, some carelessness or neglect on the part of the railroad company, which resulted in the injury of the plaintiff's leg; that if the injury was the result of an accident which ordinary prudence could not have prevented, the defendant was not liable to the plaintiff for anything, and that the verdict of the jury should be for the defendant." We do not think the court committed any error in giving the instruction. If it did, it was fully corrected by the one given at the instance of the appellant. In that, the jury were told that the railroad company was only bound to exercise ordinary prudence to prevent the injury. And they were still further instructed, on motion of the appellant, that if they believed, from the evidence, that the defendant was not guilty of negligence, the plaintiff could not recover; "that negligence consisted in not doing those things which a reasonable man in managing his own property would have done, under the circumstances shown in the evidence, or in doing those things which a reasonable

The Indianapolis, Bloomington, and Western Railway Company *v.* Beaver.

man would not have done in managing his own property, under the circumstances shown in the evidence."

The appellee was permitted to testify, over the objection of the appellant, that he was a farmer, and had a wife and children, and was farming about forty acres of ground; and it is claimed that the judgment should be reversed on account of the admission of such evidence. An objection was made to the introduction of the evidence as to the quantity of land the appellee was farming, on the ground that it was immaterial and foreign to the issue in the case. The objection urged in this court is, that the evidence tended to excite feelings of commiseration and sympathy for the appellee in the hearts of the jury. We do not so understand it. It might have been offered legitimately for the purpose of showing the calling of the appellee and the extent of his engagements, and we will presume that it was offered for that purpose. The jury was properly instructed on the subject of damages, and under the instructions the evidence objected to could not have misled them on that subject; and besides, under the uniform rulings of this court, the cause assigned for a new trial was too general to raise the question. It was, that the court erred in admitting evidence in behalf of the plaintiff over the defendant's objection. What the evidence was is not stated, nor is the name of the witness given. There is nothing in the cause stated calling the attention of the court to the evidence received.

We have examined the evidence, and are of the opinion that it sustains the verdict, and that the damages are not excessive.

The judgment of the said Montgomery Court of Common Pleas is affirmed, with costs and seven per cent. damages.

C. Black, P. S. Kennedy, and W. T. Brush, for appellant.
J. M. Cowan and T. Patterson, for appellee.

Bronenberg et al. v. The Board of Commissioners of Madison County et al.

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**BRONENBERG ET AL. v. THE BOARD OF COMMISSIONERS OF
MADISON COUNTY ET AL.**

APPEAL.—*Restraining Order and Temporary Injunction.*—Section 576, 2 G. & H. 277, authorizes an appeal from an interlocutory order dissolving an injunction in term. Restraining orders are limited in their operation to such reasonable time as may be necessary to notify the other party. Temporary injunctions are granted in vacation as well as in term, and usually continue in force until the further order of the court.

RAILROAD.—*Donation.*—*Vote by County.*—*Aid to Two Roads.*—A vote taken upon a proposition to appropriate an entire sum to be apportioned between two railroads, to aid in their construction by a county, is illegal, and the collection of the taxes levied in accordance therewith may be enjoined.

APPEAL from the Madison Circuit Court.

WORDEN, J.—This was a complaint by the appellants against the appellees, to enjoin the collection of a certain tax levied in said county, for the purpose of aiding in the construction of two railroads, viz., The Grand Rapids, Wabash, and Cincinnati Railroad, and The Lafayette, Muncie, and Bloomington Railroad. There were twelve paragraphs in the complaint, stating as many different grounds for the injunction.

On the 20th day of June, 1871, in vacation, the judge of the 17th judicial circuit granted the following temporary injunction, or "restraining order," as it is termed in the record, viz.: "It is hereby ordered, that Joseph Pugh, treasurer of Madison county, and State of Indiana, be enjoined and restrained from collecting the tax assessment for the year 1870, for the purpose of aiding The Grand Rapids, Wabash, and Cincinnati Railroad, also for the purpose of aiding The Lafayette, Muncie, and Bloomington Railroad Company, against the property of Frederick Bronenberg, Neal C. McCullough, and all other persons named in the schedule attached to the complaint, as plaintiffs, to which this order is attached, until the first day of the next term of the Madison Circuit Court, and the further order of said court, the said plaintiffs having executed a proper undertaking to secure this order," etc.

The injunction thus granted continued in force until the

Bronenberg et al. v. The Board of Commissioners of Madison County et al.

adjourned October term of the court for the year 1871, when, amongst other things, a demurrer was sustained to the third paragraph of the complaint, and, on motion of the defendants, the injunction was dissolved, and exception taken. From the order dissolving the injunction the plaintiffs appeal.

We are not favored with any brief on behalf of the appellees, but as counsel for the appellants seem to think the right of appeal in such case might be controverted, we have considered that question. The statute provides for an appeal from an interlocutory order, "granting or dissolving, or overruling motions to dissolve, an injunction in term, and granting an injunction in vacation." 2 G. & H. 277, sec. 576.

This section, as will be seen, authorizes an appeal from an interlocutory order dissolving an injunction in term, as was the case here, if the order of the 20th of June, 1871, was an injunction, as contradistinguished from a mere restraining order. Restraining orders are limited in their operation to such reasonable time as may be necessary to notify the opposite party. Temporary injunctions are granted in vacation as well as in term, and usually continue in force until the further order of the court. *Wallace v. McVey*, 6 Ind. 300. We are of opinion that the order in question was an injunction, and, therefore, that an appeal lies from the order dissolving the same.

We have seen that a demurrer was sustained to the third paragraph of the complaint. An exception was taken to the ruling. We notice this paragraph only because it alleges matters that are decisive of the merits of the controversy. It shows that the petition to the board of commissioners prayed an appropriation of one hundred and forty-seven thousand dollars to aid in the construction of the two railroads, to be apportioned as follows: twelve thousand dollars by way of donation, to aid in the construction of the Lafayette, Muncie, and Bloomington Railroad, and one hundred and thirty-five thousand dollars by way of donation, to aid in the construction of the Grand Rapids, Wabash, and Cincinnati Rail-

Huston *et al.* v. Neil.

road. The vote was ordered and taken upon the proposition to appropriate the entire sum, to be apportioned as above stated. The vote thus taken, as an entire proposition, to make an appropriation to aid in the construction of two different roads, cannot be upheld. The whole proceeding was void, and the taxes assessed to carry out the appropriation cannot be collected. This point was fully considered by this court in the case of *Garrigus v. The Board of Commissioners of Parke County*, 39 Ind. 66, and nothing need be here added to what was said in that case.

A bill of exceptions shows that the injunction was dissolved on grounds not affecting the question here involved. It was not controverted in any manner that the matters set up in the third paragraph of the complaint were true; nor was there any reason for dissolving the injunction, if the facts thus shown rendered the assessment void. We are of opinion, therefore, that the court below erred in dissolving the injunction, and that the order of dissolution must be reversed.

The order dissolving the injunction is reversed, with costs, and the cause remanded, for further proceedings.

H. Craven and J. A. Harrison, for appellants.

HUSTON ET AL. v. NEIL.

PARTNERSHIP.—*Right of Widow in Partnership Real Estate.*—Where certain real estate was purchased by partners, with partnership means, for partnership purposes, and was mortgaged to secure the payment of a partnership debt, and was afterward sold on a foreclosure of the mortgage, and purchased by the partnership creditors, leaving a balance of the partnership debt unpaid, the firm and its members being insolvent;

Held, in a suit for partition by the widow of one of the partners, who had died after said sale, that she was not the owner of any portion of the premises, though she did not join in executing the mortgage, and was not made a party to the suit for foreclosure.

SAME.—Where real estate is held as partnership property, the separate interest of each partner is his share of the surplus remaining after the payment of the

Huston *et al.* v. Neil.

debts of the firm and the final accounting between the partners. If there is no surplus, there is no real estate of which the individual partners can be seized; and in such case, the wife of a partner is not a necessary party to a suit for the foreclosure of a mortgage made by the partners to secure a partnership debt.

APPEAL from the Fayette Common Pleas.

BUSKIRK, J.—This was an action by the appellee against the appellants to obtain a partition of certain real estate.

The complaint alleges that the plaintiff was a tenant in common with the defendants in lot fifty-one of Conner's first plat in the original plat of the town of Connersville, Fayette county, Indiana; that on the 27th day of April, 1855, one Joshua Bates and one Edward Neil purchased said real estate from the Junction Railroad Company, which company, by proper deed, conveyed said property to Bates and Neil; that at the time said conveyance was made to said Bates and Neil, she was the lawful wife of the said Edward Neil, and continued to be such until the 4th day of January, 1870, when the said Neil departed this life intestate; that on the 30th day of April, 1855, the said Bates and Neil, by a mortgage duly and lawfully executed, mortgaged said lot to the defendants; that on the 17th day of March, 1859, the said mortgage was foreclosed, and said real estate was ordered to be sold; that in pursuance of said decree and order of sale, the said property was, on the 7th day of ———, 1859, sold, and was purchased by the said defendants, to whom a proper conveyance was made, and are now the owners of the undivided five-sixths thereof; that she did not join with her husband in the execution of said mortgage; that she has not parted with her interest in said property; that as the widow of said Edward Neil, deceased, she is the owner of, and entitled to, the one undivided sixth of said real estate; and that the defendants are the owners of, and entitled to, the one undivided five-sixths. There was a prayer for partition and other proper relief.

There was issue, trial by the court, finding for the plaintiff, motion for a new trial made, overruled, and excepted to, and judgment on the finding.

Huston et al. v. Neil.

The appellants have assigned for error the sustaining of a demurrer to the second paragraph of the answer, and the overruling of the motion for a new trial.

The second paragraph of the answer is as follows:

"And for further answer, said defendants say that they admit the execution of a mortgage by Joshua Bates and Edward Neil, as stated in the complaint, conveying to the defendants the premises described in the said complaint as security for a debt due by them to the defendants, and that such proceedings were afterward had on said mortgage, that the same was foreclosed, and said property was sold, and the defendants became the purchasers thereof; that said mortgage was executed on the 30th day of April, 1855, but the defendants aver that at the time of the execution of said mortgage, the said Joshua Bates and Edward Neil were, and for a long period prior to that time had been, partners, doing business under the firm name of Bates & Neil; that as such partners, said Bates & Neil were engaged in the business of constructing the Junction Railroad, as contractors of and under the said Junction Railroad Company; that as such partners, the said Bates & Neil purchased and held the property described in plaintiff's complaint, as partnership property and assets; that they purchased the same with partnership funds, for partnership purposes; that at the time of said purchase as aforesaid, the said firm of Bates & Neil was indebted to the defendants in the sum of fifty-one hundred and fifty dollars, for money and goods furnished by the said defendants to the said firm of Bates & Neil in and about their said firm business; that on the 30th of April, 1855, and three days after the conveyance of said property to said Bates & Neil, as aforesaid, by the Junction Railroad Company, said Bates & Neil executed their said note to the defendants for the said sum of fifty-one hundred and fifty dollars (a copy of which note is herewith filed and made part hereof), and on the same day executed a mortgage on said real estate as security for said note and the debt evidenced thereby (a copy of which mortgage is also filed here-

with and made a part hereof); and the defendants say that said mortgage is the same of which foreclosure was had, and to satisfy which said property was sold as aforesaid; and the defendants aver that after the sale of said property as aforesaid, and the application of the proceeds to the payment of said debt, there remained unpaid a balance of said debt to the amount of one thousand dollars, which said balance yet remains unpaid; and the said firm and the several members thereof have been since, and were prior to the rendition of the judgment mentioned in said complaint, wholly and notoriously insolvent; wherefore the said defendants say as against them, creditors of said firm as aforesaid, said plaintiff has no interest whatever in said real estate, or right to partition thereof, and they pray judgment," etc.

The substance of the above answer is, that the property in controversy was purchased by partners, with partnership means, for partnership purposes, and that it was mortgaged to secure a partnership debt, and was sold on a foreclosure of such mortgage, and purchased by the partnership creditors, leaving a balance of their judgment unpaid, the firm and the members composing it being insolvent.

It is insisted by counsel for appellants that property thus acquired and held is regarded and treated as personal property and goes to pay the debts of the partnership, and only after they are paid does it, or what is left of it, become the individual property of the partners; and that as it was applied to the payment of partnership debts, leaving a balance of such debts due and unpaid, the firm and individual members thereof being insolvent, the same was never held and owned by the said Bates & Neil as real estate; and that consequently no portion thereof descended to, or is owned by, the plaintiff by virtue of her marital rights.

There is an irreconcilable conflict between the English and American doctrine on this subject, and there is much conflict in the rule of decision adopted in the different states.

We find the law stated with great clearness and accuracy by Parsons in his work on Partnership. After speaking

Huston et al. v. Neil.

of the English doctrine, he says: "In this country the rule is otherwise. Neither of the reasons above stated apply to us. There is not, and we know no reason why there should be, any reluctance to recognize as partnership property any real estate which the owners wish should be so considered. And when it has fulfilled all its functions as personal property, in respect of the partnership, the partners, and the creditors, and is no longer wanted for these, it may now become in their hands who have the legal title, real estate, and subject to all incidents as such; because the same persons with us take the personalty and inherit the realty, and it will be much simpler and easier for them to take at once as realty that which is realty. The following, then, is the American rule: Real estate, purchased and held as partnership property, is so treated in equity, and subjected to all the incidents of partnership property. If there be death, the surviving partner, whether he hold the whole title, or hold it in part, or hold none of it, if he be a creditor of the partnership, has the same rights against the real estate, and only the same, which any other creditor has. But this real estate goes to pay the debts of the partnership, and only after they are paid does it, or what is left of it, become the property of the partners, or their representatives, free from all claims; and then it is divided between them just as so much money capital would be. But it then becomes at once real estate, or rather, all the incidents and qualities of real estate revive. This rule goes upon the ground of a trust imposed upon all who hold the legal title, in behalf of all partnership objects; and, that trust once discharged, the residue resumes its former character."

The same author, in speaking of the right of dower, in such real estate, says: "The English rule would seem to cut this off. But in this country it is quite well settled that while dower yields to the claims of partnership creditors, whether they are of the firm or strangers, and therefore cannot be granted until all the partnership debts are paid or secured, yet, when this is accomplished, as the land is

treated in the same way as if it had never entered into partnership property, dower revives."

The previous rulings of this court are in harmony with the principles above enunciated. *Matlock v. Matlock*, 5 Ind. 403; *Hale v. Plummer*, 6 Ind. 121; *Roberts v. McCarty*, 9 Ind. 16; *Patterson v. Blake*, 12 Ind. 436; *Holland v. Fuller*, 13 Ind. 195; *Dean v. Phillips*, 17 Ind. 406; *Schæffer v. Fithian*, 17 Ind. 463; *Kistner v. Sindlinger*, 33 Ind. 114.

This court, in *Hale v. Plummer*, *supra*, quote with approval the following: "In a late decision in New York, Chancellor WALWORTH uses the following language: 'The American decisions in relation to real estate purchased with partnership funds, or for the use of the firm, are various and conflicting. But I think they may generally be considered as establishing these two principles. First, that such real estate is in equity chargeable with the debts of the co-partnership, and with any balance that may be due from one co-partner to another, upon the winding up of the affairs of the firm. Secondly, that as between the personal representatives and the heirs at law of the deceased partner, his share of the surplus of the real estate of the co-partnership, which remains after paying the debts of the co-partnership and adjusting all the equitable claims of the different members of the firm, as between themselves, is to be considered and treated as real estate.' *Buchan v. Sumner*, 2 Barb. Ch. R. 165. *Buckley v. Buckley*, 11 Barb. S. C. R. 44."

It is insisted by counsel for appellee, that the answer is defective for not averring that the firm and the members composing it were insolvent at the time the decree of foreclosure was rendered. The averment on that subject is as follows: "And the defendants aver that after the sale of said property as aforesaid, and the application of the proceeds to the payment of said debt, there remained unpaid a balance of said debt to the amount of one thousand dollars, which said balance yet remains unpaid, and the said firm and the several members thereof have been since, and were

prior to, the rendition of the judgment mentioned in said complaint, wholly and notoriously insolvent."

We think the objection untenable. It seems to us that the averment that the insolvency existed prior to and since the rendition of the judgment, creates the implication that it existed at the time thereof. But however that may be, we consider the other averment, that a thousand dollars of a partnership debt remained due and unpaid was sufficient. This court, in *Patterson v. Blake, supra*, uses this language: "But it is insisted that the lands, etc., being partnership property and stock in trade, the court erred in awarding the partition. The position thus assumed, would be tenable, did it appear that there existed outstanding debts against the partnership, or joint liabilities uncanceled; but as the case stands, no such debts or liabilities appear to exist, and consequently there seems to be no valid reason why the action of the court in ordering the partition, should be held erroneous."

It is also insisted by counsel for appellee that she was a proper and necessary party to the proceeding to foreclose said mortgage, and that as she was not made a party, her rights cannot be and are not affected by such foreclosure and the sale made in pursuance thereof.

If the property in controversy was partnership property, then the interest of Neil was but the surplus remaining after the payment of the debts of the firm and the final accounting between the partners. If there was no surplus, Neil was never seized of the property, as real estate, at any time prior to his death, and consequently his wife had no interest in such property which would make her a necessary party to the suit to foreclose. Those only are necessary parties defendants who have or claim an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the questions involved. Sec. 18 of the code, 2 G. & H. 46.

The case of *Fletcher v. Holmes*, 32 Ind. 497, is, upon the point under examination, much in point, and conclusively settles the question against the appellee.

Ferguson v. Ramsey.

In the quotation hereinbefore made from Parsons on Partnership, the author speaks of dower. Our statute has abolished dower and substituted in its place one-third in fee simple, but the same principles of law will apply to both alike.

We are very clearly of the opinion that the facts stated in the second paragraph of the answer constituted a complete defence to the action, and that the court erred in sustaining the demurrer thereto, for which error the judgment must be reversed.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to overrule the demurrer to the second paragraph of the answer, and for further proceedings in accordance with this opinion.

J. C. McIntosh, for appellants.

Helm, Puntenney & Little, for appellee.

FERGUSON v. RAMSEY.

PRACTICE.—Amendment.—Name.—Where the Christian name of a plaintiff is incorrectly stated in the complaint, but properly given in the summons, it is not error in the court to permit the amendment.

COMPLAINT.—Demurrer.—A complaint that charged that the defendant, as the agent of the plaintiff, had sold certain real estate and received the money therefor and failed to account, and also charged him with a balance due for personal property sold to him, was held good on demurrer for want of sufficient facts.

ANSWER.—Statute of Frauds.—Answer in Full.—An answer to this complaint, that as to the sale of the land, it was a charge of the plaintiff against the defendant upon a contract for the sale of land, and that the contract was not in writing, was not a good defence. The complaint was not upon a contract for the sale of land to the defendant. Nor did the paragraph answer the entire complaint.

PRACTICE.—General Denial.—Paragraph Stricken Out.—A paragraph alleging that the land was, at the time of the sale, the property of the defendant, was properly stricken out, the general denial being also pleaded in answer.

PLEADING.—Statute of Limitations.—Part Payment.—To an answer of the statute of limitations, a reply that the defendant, within six years, paid on the claim mentioned fifty-one dollars as a part payment, was sufficient.

Ferguson v. Ramsey.

PRACTICE.—*Affidavit for Continuance.—Time to Prepare Affidavit.*—A party is not entitled, as a matter of right, to time to prepare an affidavit for continuance. Unless a reason be shown for claiming such time for preparation, the action of the court in refusing it will be affirmed.

AMENDMENT.—*Description of Land.*—An error in the description of the land sold, which was not shown to have misled the defendant, was properly corrected on motion when the error appeared by the evidence.

PRACTICE.—*Reasons for New Trial.—Too General.*—Irregularity in the proceedings of the court, and error of law occurring at the trial, when thus vaguely stated as causes in a motion for a new trial, will not be noticed on appeal.

APPEAL from the Lawrence Common Pleas.

OSBORN, C. J.—This was an action by the appellee against the appellant. The original complaint was in the name of Milton M. Ramsey, plaintiff. The summons was in the name of Alexander, instead of Milton. The court gave the appellee leave to amend his complaint, by substituting his true name, to correspond with the name in the summons, to which the appellant excepted. There was no error in this action of the court. 2 G. & H. 118, sec. 99; *Abshire v. Mather*, 27 Ind. 381.

The complaint alleges that the appellant, as the agent of the appellee, sold certain real estate, and received the money therefor, and failed and refused to pay it to the appellee on demand; and that he owed him a balance for a span of horses, sold to him. A demurrer to the complaint was overruled, and the appellant excepted. The demurrer was correctly overruled. The action was not as the appellant supposed, upon a contract for the sale of land, but to recover the amount received for land sold by an agent and a balance due on the sale of horses.

The appellant filed an answer in six paragraphs; first, general denial; second, that as to the sale of the lands, it was a charge of the plaintiff against the defendant upon a contract for the sale of land, and that the contract was not in writing; third, the statute of limitations; fourth, that the land sold, at the time of the sale, was the property of the defendant; fifth, payment; sixth, set-off.

The appellee filed a demurrer to the second paragraph of

the answer, which was sustained. He also moved to strike out the fourth, which was sustained. To the fifth and sixth, a reply of general denial was filed. To the third, there was a reply filed of two paragraphs; first, that the cause of action did accrue within six years before the commencement of the action; second, that within six years, the defendant paid the plaintiff fifty-one dollars, as a part payment of the claim in the complaint. The appellant filed a demurrer to the paragraph of the reply alleging a partial payment within six years, which was overruled. He then moved the court for a continuance, and asked time to prepare an affidavit in support of the motion. The motions were overruled.

The cause was tried by the court, finding for the plaintiff, motion for a new trial overruled, and final judgment on the finding. Proper exceptions were taken.

The causes for a new trial were, first, irregularity in the proceedings of the court, by which the defendant was prevented from having a fair trial; second, the finding of the court was not sustained by the evidence; third, the finding was contrary to law; fourth, error of law occurring at the trial, and excepted to by the defendant; fifth, the damages found by the court were excessive.

The second paragraph of the answer did not contain facts sufficient to bar the action. The action was not instituted to recover on a contract for the sale of land. What we said relative to the demurrer to the complaint applies to the demurrer to the second paragraph of the answer. And, besides, it purported, but failed, to answer the whole cause of action. The fourth paragraph was correctly stricken from the files. The general denial was in, and this was but a repetition of it. Under it no evidence could be introduced, which could not have been under the general denial. The demurrer to the reply was correctly overruled. 2 G. & H. 164, sec. 223; *Conwell v. Buchanan*, 7 Blackf. 537.

The court committed no error in overruling the motion, and in refusing to give time to prepare an affidavit for a con-

Ferguson v. Ramsey.

tinuance. No reason is stated in the bill of exceptions, in a subsequent affidavit, or otherwise, why the affidavit had not been prepared. In the absence of some substantial reason against it, we will presume in favor of the action of the court in such matters. The appellant was not entitled to time to prepare the affidavit as a matter of right. It is only for cause that the court will grant time for that purpose, when the action is called for trial.

The complaint described the lots sold as lots 40, 41, 42, 43, 44, and 45, in the town of Mitchell. It appeared in the evidence that the appellee had purchased of Malott several lots in that town, and held a title bond for them; that the appellant was his surety in a guardian's bond, and required security to indemnify himself for loss on account of such suretyship; that the appellee assigned the bond and delivered it to him for that purpose, with directions to sell the lots; that the appellant did sell, and Malott conveyed them to the purchaser, who paid the appellant the purchase-money; that the appellee had settled his guardianship, and the appellant refused to account for, or pay over, the amount received on the sale of the lots. When the deed for the lots was produced by the appellant, it was found that they were not correctly described in the complaint. A correct description was, 140, 141, 142, 143, 144, and 145. The court permitted the appellee to amend his complaint to conform it to the facts proved. 2 G. & H. 118, sec. 99. The appellant did not file his own, or any other affidavit, or otherwise offer to prove that he had been misled. 2 G. & H. 114, sec. 94. The action was to recover for money collected for land sold. There was a mistake in the description. That is the variance complained of. 2 G. & H. 116, sec. 96, does not apply to such a case. The action was not unproved in its general scope and meaning.

The first and fourth causes for a new trial do not sufficiently point out or state the irregularity or error complained of, to raise any question, and, consequently, this court could not properly consider it, for the purpose of correcting any

 Worthington v. Dunkin et al.

irregularity or error of the court below, in allowing the amendment complained of, even if such act had been erroneous.

We have examined the evidence, and think it sustains the finding of the court, and that the damages are not excessive.

The judgment of the said Lawrence Common Pleas Court is affirmed, with costs.

S. W. Short, for appellant.

A. D. Lemon and N. Crooke, for appellee.

41	515
125	100
41	515
125	100
41	515
147	253

WORTHINGTON V. DUNKIN ET AL.

GUARDIAN AND WARD.—*Petition to Sell Real Estate.*—*Description of Ward's Interest.*—*Order of Sale.*—*Statute.*—Where the interest of a ward in certain real estate, under the statutes of 1843, was described in a petition to sell the same, as a reversionary interest, created by a will which was referred to, and it was alleged that it would not accrue until after the decease of the guardian, who by the will had a life estate in the land, the averments sufficiently showed that the interest was in remainder and not in reversion. The mistake in calling the interest a reversionary one was not, therefore, material, where the order of the court was also broad enough to cover whatever interest the ward had in the land.

SAME.—*Jurisdiction of Subject-Matter and Person.*—If the court, having jurisdiction over the subject-matter and of the ward, who was represented in the court by his guardian, erred in holding an insufficient petition to sell real estate of the ward to be good, it was a mere error, and not a defect of jurisdiction.

SAME.—*Omission to Sign Appraisement.*—*Statute.*—The failure of the appraisers to sign their appraisement was a defect which did not avoid the sale as against purchasers in good faith, under section 27, Rev. Stat. 1843, p. 458.

SAME.—*Private Sale.*—*Statutes of 1843, 1845, and 1847.*—*Innocent Purchaser.* By the act of 1843, pp. 529, 530, sections 233, 239, as amended by the act of 1845, p. 17, and the act of 1849, p. 52, the court was authorized to make an order allowing the guardian to sell the land of his ward at private sale for two-thirds of its appraised value. Without this permission, such an order would not avoid the sale in the hands of an innocent purchaser, when the land sold for its full appraised value.

Worthington v. Dunkin et al.

SAME.—*Notice Not Required.—Statute.*—Under sections 114, 118, R. S. 1843, p. 613, a notice was not contemplated in case of private sales. BUSKIRK, J., dissented.

SAME.—*Jurisdiction.—Conclusive Presumption.*—As the probate court entertained and granted the petition, it must be presumed that it was shown to that court that the guardian was a duly appointed and qualified guardian of his ward, and that therefore it conclusively appeared that he took the necessary oath.

SAME.—*Deed of Guardian.—Record.—Evidence.*—The act of 1847, p. 117, required the guardian's deed to be entered at length upon the final record, and therefore such record, including the deed, was admissible in evidence.

SAME.—*Recitals.—Statute of 1847.*—Under section 2 of the act of 1847, p. 117, it was only necessary that a guardian's deed should contain succinct statements of the order of the court directing the sale, or the order confirming the same, or the order directing the conveyance.

SAME.—*Sale.—Proceedings to Set Aside.—Evidence.—Purchaser in Good Faith. Record Conclusive.*—On the trial of an action to recover land which had been sold by a guardian, on the ground that the proceedings were invalid, the plaintiff offered to prove that no sale of the land was ever made by the guardian; that his report of the sale and receipt of the purchase-money was untrue; that the transactions set forth in the probate record were the result of a barter and exchange between the guardian and the purchasers, the guardian taking the land received in exchange in his own name, and that no money was ever paid or agreed to be paid therefor by the purchasers from said guardian.

Held, that the evidence was not admissible against the defendant, who was a purchaser in good faith, and who had a right to rely upon the record, unless a knowledge of its falsity was brought home to him.

APPEAL from the Fountain Circuit Court.

WORDEN, J.—This was an action by the appellant against the appellee Sarah Dunkin to recover possession of, and quiet the title to, a certain tract of land. The other appellee, Van Meter, asked, and was permitted, to be made a defendant in the action on the ground that he had sold the land to said Sarah Dunkin, and had made her a warranty deed therefor.

Issue, trial by the court, finding and judgment for the defendants, a new trial being denied to the plaintiff.

The following are the facts in the cause:

George Worthington, the grandfather of the plaintiff, died, seized of the land in controversy, in the year 1834. By the last will of said George, he devised all his real estate in Fountain county, including that in controversy, to his wife,

Lydia Worthington, during her natural life. After her death, the tract in controversy was to go to his son, William Worthington, during his natural life, and after his death, the remainder was to go in fee to the appellant, the son of said William Worthington. The devisees were all in being at the death of the testator. Lydia Worthington is dead, but when she died does not appear. William survived her, and died in 1868. On the 15th of December, 1849, William Worthington, together with his wife, for the consideration of one thousand dollars, as stated in the deed, conveyed all their right and title to the premises to James McDonald and James Spears. On the 20th of May, 1850, William Worthington, as the guardian of his son, Thomas M., the appellant, for the consideration of five hundred dollars, executed a conveyance of all the right, title, and interest of the said Thomas M. in and to the premises to said James McDonald and James Spears. The proceedings of the court authorizing the sale by the guardian will be stated and considered hereafter.

On the 17th of August, 1850, McDonald and Spears, with their wives, executed a warranty deed for the premises, for the consideration of one thousand five hundred dollars, to Joseph Dunkin. Joseph Dunkin, on the 13th of September, 1850, for the consideration of one thousand five hundred dollars, conveyed and warranted the land to said Harrison Van Meter, and on the 28th of February, 1866, the said Van Meter, for the consideration of six thousand dollars, conveyed and warranted the land to the appellee Sarah Dunkin.

If the guardian's deed enures effectually to the benefit of the appellee, then her title is complete and perfect. Otherwise the appellant is entitled to the land.

There were two proceedings in the probate court of Fountain county by William Worthington as the guardian of his son Thomas M., for the sale of the land. We shall notice the latter only, as we may suppose the latter was resorted to in consequence of supposed defects in the former.

Worthington v. Dunkin et al.

On the 20th of May, 1850, the latter proceedings were commenced. The record shows the following entry:

"William Worthington, guardian for Thomas M. Worthington, *v.* His said Ward. Be it remembered, that on the 20th day of May, Anno Domini, one thousand eight hundred and fifty, the same being the 7th judicial day of said May term of the probate court, and before the Honorable David Rawles, probate judge, comes now the said guardian, and on motion, files his petition herein, which petition is in the words and figures following, to wit: To the Honorable Court of Fountain county, Indiana. Your petitioner, guardian of the person and estate of Thomas M. Worthington, a minor, would respectfully represent that the said Thomas M. Worthington has a reversionary interest in and to the west half of the south-east quarter of section 12, in town 21 north, and range 7 west; said interest being created by a devise in the last will and testament of George Worthington, deceased, late of said county; and whereas the said interest will not accrue until after the decease of your petitioner, which may be many years hence, and whereas the buildings, fences, etc., are rapidly decaying, your petitioner would therefore pray your honor to grant your petitioner, as aforesaid, power to sell and convey the interest of the said Thomas M. Worthington, as aforesaid, in and to the premises aforesaid, and apply the proceeds thereof to the purchase of real estate, or be placed at interest. The said sale would, in the opinion of your petitioner, be much to the benefit of said Thomas M. Worthington as aforesaid. And your petitioner, as in duty bound, will ever pray, etc. May 20th, 1850.

"WILLIAM WORTHINGTON,

"Guardian of said Thomas M. Worthington.

"Sworn to in open court, May 20th, 1850.

"J. RISTINE, Clerk."

The court thereupon appointed Jesse Marvin and Joseph Poole as appraisers of the property, who were duly sworn in open court as such; and on the same day they returned to the court their appraisal of the property, appraising it at

the sum of five hundred dollars. The report of the appraisers, however, although returned and entered of record, does not appear to have been signed by the appraisers. An additional bond with surety was filed by the said guardian, and approved by the court. Thereupon the court ordered the sale, in the following terms: "And the court, being sufficiently advised in the premises, and being satisfied that the interests of the said Thomas M. would be promoted by the sale of his said interest in and to the said lands, order and decree that the guardian sell the said interest of his said ward at private sale, for cash in hand, at not less than two-thirds of the appraised value thereof, and that he report the proceedings herein to this court at the present term."

On the same day, the said guardian made a report to the court, in which report he styled himself a commissioner appointed by the court, and in which he reported that on that day he had sold the property to James D. McDonald and James Spears for five hundred dollars cash in hand, being the highest and best price which he could obtain for the premises. The report was confirmed by the court, and the guardian ordered to execute a deed to the purchasers for the property. On the same day, the guardian executed a deed accordingly, and reported the same to the court, which said deed, "having been seen and inspected by the court," was confirmed.

Several objections are made to the title thus claimed to have been acquired under the proceedings in the probate court, which we will proceed to consider. Before doing so, however, we will notice some statutory provisions in force at the time of the sale in question, and having a bearing upon the questions presented. Sections 110 to 118 inclusive, R. S. 1843, p. 612, provide for the sale of lands of minors by their guardians. Section 110 provides, amongst other things, that, "whenever it shall appear to be necessary for the education of any minor, or for the sustenance of any minor, insane person, or the family of either, that the real estate of such minor or insane person should be sold, or if it should be made to appear to such court that such real estate is suf-

Worthington v. Dunkin et al.

fering unavoidable waste, decay, or injury, or that the value of such real estate can be invested in other property to the manifest advancement of the estate and interest of such minor or insane person, * * * the court, on the application of the guardian, may order the sale of such real estate, or so much thereof as, in the opinion of the court, it would be proper to sell."

The other sections provide for the application for power to sell being filed in writing, verified by the oath of the guardian; the appointment of appraisers by the court, who are to be sworn, and who are to make a return in writing to the court of their appraisal, signed by them; the giving of an additional bond by the guardian, with surety, and the approval thereof by the court; the ordering of the sale by the court; the making of a report to the court of the sale; and the confirmation of the sale by the court and the directing of a conveyance to the purchaser.

At page 458, sec. 27, is found the following provision: "In case any action shall be brought for the recovery of any real estate, sold by any executor, administrator, or guardian, under the direction of any court, or if any other action be brought by which the validity of the sale shall be contested, such action shall not be maintained, nor such sale avoided, on account of any irregularity or defect in the proceedings, if it shall be made satisfactorily to appear, first, that the sale was authorized and directed by a court of competent jurisdiction; second, that the executor, administrator, or guardian, took the oath, and gave bond, as may be required by law; third, that notice of the time and place of sale was given, in the manner prescribed by law; fourth, that the premises were sold accordingly, and are held by one, or under one, who purchased them in good faith."

If the four matters appear that are specified in the provision above quoted, the sale must be held valid. We need not, in this case, decide whether or not a sale could be upheld on general principles, where such matters do not all appear.

The land is held by Sarah Dunkin. She and her grantor, Harrison Van Meter, and his grantor, Joseph Dunkin, were purchasers in good faith. They purchased for a valuable consideration, and there was no evidence given or offered that either of them had any notice of any defect or irregularity in the sale made by the guardian. Sarah Dunkin is, therefore, not only a purchaser in good faith, but she also holds under those who were also purchasers in good faith. She comes within the fourth clause of the section of the statute above quoted.

It is objected that the petition filed by the guardian for an order for the sale of the land was not sufficient to give the court jurisdiction, because it did not sufficiently describe the ward's interest in the land; or if sufficiently described by reference to the will of the testator, the interest was an estate in remainder, and not in reversion as set forth in the petition.

The interest is described in the petition as a "reversionary interest," but it is shown that it was created by the will of George Worthington, deceased, and that it would not accrue to the said ward until after the decease of the said guardian, who we have seen had, by said will, a life estate in the premises. This we think sufficiently shows that the estate of the ward was an estate in remainder, and not in reversion. The mistake in calling his interest a reversionary one is a matter of but little importance, especially as it appeared on the face of the petition that it was an interest in remainder. The order of the court for the sale of the land is broad enough to cover whatever interest the ward had therein, and this consideration is decisive against the objection under consideration. In the language of the statute quoted, "the sale was authorized and directed by a court of competent jurisdiction." The court had jurisdiction over the subject-matter and of the ward, who was represented in the court by his guardian. It had the power to pass upon the sufficiency of the petition. This power to hear and determine is jurisdiction. *Dequindre v. Williams*, 31 Ind. 444. If a court thus

Worthington v. Dunkin et al.

having jurisdiction errs in holding an insufficient petition to be good, it is a mere error, and not a defect of jurisdiction.

Again, it is urged that the petition did not state facts sufficient to authorize the court to direct the sale of the land. What we have said above disposes of this objection.

It is objected that the order of sale was void, because it authorized a private sale at not less than two-thirds of the appraised value of the property, inasmuch as the 118th section of the statute above referred to (R. S. 1843, p. 613) requires that at private sale the property must sell for its appraised value. We have seen, however, that the land was sold for the full appraised value. The appraisers returned their appraisement into court, but it was not signed by them. The failure of the appraisers to sign their appraisement is a defect, as we have seen by the statute above set out, which will not avoid the sale as against purchasers in good faith. But it is insisted that although the property was sold for its appraised value, the order was void because the court had no power to make an order for the private sale of the property for less than its appraised value. We are strongly inclined to the opinion that if there was no law authorizing a private sale for less than the appraised value, the order in question was not void, but simply erroneous, and that under the statute the error would not avoid such sale, as against purchasers in good faith. But we are led to inquire whether the order was erroneous; in other words, whether there was no law that authorized the guardian to sell at private sale for two-thirds of the value of the property. By the 118th section above cited, guardians could not sell at private sale for less than the appraised value. But we find no restriction in the statutes of 1843 upon the power of the guardian to sell at public sale for any sum. He was not required to sell at public sale for two-thirds of the appraised value. If there is any provision therein requiring property sold by a guardian at public sale to bring two-thirds of its value, it has not been pointed out to us, and we have been unable to find it. By the law of 1843, then, a guardian might sell at public

sale at any price that he could get, the sale being, of course, subject to the approval or disapproval of the court; but at private sale he could sell only for the appraised value of the property. By the statutes of 1843, executors and administrators could sell land at private sale, but not for less than its appraised value; but in public sales by them the lands could not be sold for less than they could be sold for on execution. R. S. 1843, pp. 529, 530, secs. 233, 239. By an act of 1845 (Acts 1845, p. 17), it was provided, "that when any executor or administrator shall be ordered by any probate court to sell any real estate, it shall be lawful for such executor or administrator to make sale thereof for any sum not less than two-thirds of the appraised value of such estate." And by an act of 1849 (Acts 1849, p. 52), it was provided, that the above act "be and the same is hereby extended to sales made by guardians to minors, idiots, or insane persons, in the same manner as the same applies to sales by executors and administrators." In order to give the latter act any effect at all, it must be held to apply to private sales, because at the time of its passage guardians could sell at public sales for two-thirds or less than two-thirds of the appraised value of the property. We are of opinion, therefore, that the latter act applied to private sales by guardians, and hence that the order of the court, in respect to the point under consideration, was not erroneous.

It is objected that the order did not provide for any notice of the sale, and that the sale was made without notice. It is apparent that no notice of the sale could have been given as the whole proceedings, from the filing of the petition to the confirmation of the sale, took place on the same day. This objection raises the question whether under the statutes of 1843, any notice of the sale was necessary where the sale was private. The two provisions of the statute bearing upon this point (R. S. 1843, p. 613) are as follows: "Sec. 114. Upon such bond being filed and approved by the court, the court shall order the sale of such real estate, providing in the order for reasonable notice of such sale, the credits to

Worthington v. Dunkin *et al.*

be given for the payment of the purchase-money, and the mode of securing the same.

"Sec. 118. Any real estate of such ward may be sold by the guardian at private sale by order of the court, on such terms as the court shall direct; but it shall not be sold for less than the appraised value thereof."

We are of opinion that under these provisions notice was not contemplated in cases of private sales. In the section providing for private sales, nothing is said on the subject of notice, and we think it was the intent that such sales should be made without notice. It is believed to have been the practice, under that statute, in portions of the State at least, if not generally, to make such sales without notice; and to hold now that notice was necessary would be to disturb and unsettle many titles that have heretofore been regarded as valid and indisputable. No notice was required in such case, and the third specification in section 27, before quoted, can only be held applicable to cases where notice is required, as in none other is a notice "prescribed by law."

It is also objected that it does not appear that the guardian took the oath as required by law.

We think as the probate court entertained and granted his petition, we must presume that it was shown to that court that he was a duly appointed and qualified guardian of his said ward. Indeed the court must be deemed to have decided that the guardian had been duly appointed and qualified; otherwise the order could not have been made authorizing him to sell his ward's land. *Dequindre v. Williams, supra.* We are of opinion, therefore, that it does appear conclusively that the guardian took the necessary oath.

In the introduction of the final record of the proceedings of the probate court, the defendants introduced, as part of the record, the record of the deed from the guardian to the purchasers of the land. This the plaintiff objected to, on the ground that the deed did not constitute any legitimate part of the record, and hence could not be proved by the record. An act passed in 1847 (Acts of 1847, p. 117) requires such

deeds to be entered at length upon the final record. Hence the entire record, including the deed, was admissible.

Again, it is objected that the guardian's deed is void because it does not recite at large the time of filing the petition; the order directing the sale, the order confirming the same, and the order directing the conveyance, as required by section 244, R. S. 1843, p. 531.

A later statute, however, provides, "that in all conveyances, assignments, or transfers ordered by any of the probate courts of this State, it shall not be necessary to set forth at large the order of such court directing any sale of real estate, or the order confirming the same, or the order directing such conveyance, assignment, or transfer, but succinct statement of such orders shall be sufficient." Acts 1847, p. 117, sec. 2.

The deed in question fully complies with the provisions of the latter act, and is valid.

None of the objections made to the defendants' title, derived through the guardian's sale of the land, can be sustained.

There remains another question to be considered. On the trial of the cause, and at a proper time, the plaintiff offered to prove that no sale of the land was ever made by the guardian; that his report of the sale and receipt of the purchase-money was untrue; that the transactions set forth in the probate record were the result of a barter and exchange of land by and between William Worthington and James D. McDonald and James Spears, whereby the said Worthington, acting as guardian for plaintiff, had traded and exchanged the plaintiff's interest in the lands in controversy to said McDonald and Spears for other lands, the title to which said William took in his own name, and that said barter thus made was the sole consideration of the attempted transfer of title under the order of the probate court, and that no money was ever paid for said land, or agreed to be paid therefor by the purchasers from the said guardian.

Sparks v. Davis et al.

This evidence was rejected, on the objection of the defendant, and the plaintiff excepted.

We are of opinion that the evidence was correctly excluded. The probate record showed a sale for cash in hand. Joseph Dunkin, Harrison Van Meter, and Sarah Dunkin must be regarded as purchasers in good faith. They had a right to rely upon the record, unless a knowledge of its falsity was brought home to them. The facts offered to be shown could not affect the title of either, in the absence of notice to them of the facts. There was no offer to prove that either of them had such notice. The evidence, as offered, could not have affected the title of the defendants; hence it was properly rejected.

We have thus considered, we believe, all the grounds relied upon for a reversal of the judgment, and find no error in the record.

The judgment below is affirmed, with costs.*

BUSKIRK, J., dissents from so much of the above opinion as holds that a notice was not required in a private sale by a guardian under the statute of 1843.

M. M. Milford and T. F. Davidson, for appellant.

J. Poole and J. McCabe, for appellees.

*Petition for a rehearing overruled.

SPARKS v. DAVIS ET AL.

PRACTICE.—*Motion for New Trial.—Evidence.*—Where it is alleged as a cause in a motion for a new trial, that the court erred in admitting evidence against the plaintiff, the particular evidence objected to should be pointed out.

SAME.—*Supreme Court.*—If there be evidence in support of the finding, this court will not disturb the finding on the weight of evidence.

SAME.—*Demurrer.*—The ruling upon a demurrer is not a ground for a new trial.

APPEAL from the Madison Circuit Court.

DOWNEY, J.—Complaint by the appellant against the

appellees to review a judgment recovered by the appellees against the appellant. Issues were formed, there was a trial by the court, a finding for the defendants, a motion for a new trial made by the plaintiff overruled, and final judgment rendered for the defendants.

The alleged error is the overruling of the motion for a new trial.

The reasons for a new trial are as follows: first, because the finding of the court is contrary to law; second, because the finding is not sustained by sufficient evidence; third, because the court erred in the admission of evidence against the plaintiff; fourth, because the court erred in overruling the plaintiff's demurrer to the first, second, and third paragraphs of the defendants' answer.

The first reason for a new trial is not relied upon. It seems to have been inserted because it is a statutory reason for a new trial, and because it would be a violation of a time-honored usage not to do so, more than for any other reason.

The second reason involves the sufficiency of the evidence. Governed by the rule which controls this court in the re-examination of questions of fact, we cannot disturb the action of the circuit court on account of the insufficiency of the evidence. There was evidence to support the finding.

The third reason is, that the court admitted evidence against the plaintiff. As there was an issue of fact to be tried by the court, we do not see the alleged impropriety in the action of the court in admitting the evidence offered by the defendants against the plaintiff. If there was any particular part of the evidence which was improperly admitted by the court, that should have been specially designated or pointed out in the reasons for a new trial.

The fourth reason for a new trial is not among those enumerated in the statute. 2 G. & H. 211, sec. 352. An error in sustaining or overruling a demurrer to a pleading is in no case a ground for a new trial. It is not an error committed on the trial. Authority on this point is surely unnecessary.

Gavin v. Buckles.

The judgment is affirmed, with costs.

H. Craven, R. Lake, W. R. Pierce, and H. D. Thompson,
for appellant.

W. March, for appellees.

GAVIN v. BUCKLES.

VENDOR AND PURCHASER.—Breach of Covenant.—Assignee.—Consideration.

In an action by an assignee of a real covenant which runs with the land, for a breach thereof, the true consideration may be shown, as well as in an action brought by the immediate covenantee.

SAME.—Evidence.—Statute.—Where the immediate grantor has died, and the action is brought against the person who conveyed the property to the deceased, the defendant is a competent witness to prove the consideration received from the deceased. The proviso of the second section of the act defining who shall be competent witnesses, 3 Ind. Stat. 559, does not include this class of cases.

APPEAL from the Delaware Common Pleas.

WORDEN, J.—This was an action by the appellant against the appellee, upon the covenants contained in a deed in the statutory form, 1 G. & H. 260, sec. 12, for a certain tract of land. Buckles conveyed the land to John F. Stevens, for the consideration, as expressed in the deed, of four hundred dollars. Afterward Stevens conveyed the land, by deed in the same form, to the appellant Gavin, for the same sum expressed as the consideration. Breach, that neither Buckles nor Stevens, at the time of the execution of the deeds, had any right, title, or interest in the land, nor has either of them acquired any title since, nor did the plaintiff acquire any right or title thereto, nor is he in possession thereof.

Issue, trial by the court, finding and judgment for the plaintiff for a sum much less than the purchase-money, as expressed in the deeds. The plaintiff moved for a new trial, stating grounds that raise the questions hereinafter considered.

41	528
128	889
41	528
159	4

The land mentioned is a tract of a little less than forty acres. Stevens, the grantee of the defendant, and the immediate grantor of the plaintiff, was dead at the time of the trial.

On the trial, the defendant was admitted as a witness on his own behalf, and testified that the consideration which he received for the land from Stevens was only three dollars per acre, amounting to a little less than one hundred and twenty dollars, instead of four hundred dollars, as specified in the deed from him to Stevens. Due objection was made to the competency of the witness and the admissibility of the evidence.

Two questions are thus raised; the one as to the admissibility of the evidence as coming from any source, and the other as to the competency of the defendant as a witness to prove the facts.

Before proceeding to examine these questions, we may observe that the question whether the covenants of seizin and right to convey are covenants running with the land, and hence, whether the plaintiff can maintain this action at all against the defendant, is not in any manner before us. We therefore express no opinion on that question. The defendant demurred to the complaint for the want of facts sufficient, but the demurrer was overruled, and he excepted. No cross error, however, has been assigned. We must assume, therefore, for the purposes of the case, that the covenants, for the breach of which the suit was brought, were real covenants running with the land, and that the action was well brought by the plaintiff against the defendant.

Was the evidence competent? It is conceded by the appellant that the measure of damages for the breach of such covenants is the purchase-money and interest. It is also conceded that, as between the immediate parties to a conveyance containing the covenants, the consideration clause is open to explanation, and that parol proof that the purchase-money was less than the amount mentioned in the deed is admissible.

Gavin v. Buckles.

But it is contended that when, as in this case, the action is brought by a remote grantee, the amount of the consideration, as expressed in the deed, is conclusive upon the parties, and cannot be varied by parol evidence. Authorities have been cited which seem to sustain this position. We are not aware that the question has been passed upon in this State. We are inclined to the opinion that the same rule should prevail, whether the action be brought by an immediate or a remote grantee. It has been the general policy of our law, except in cases of commercial paper, to permit the same defence to be made where a contract has been assigned, as where it has not been assigned. Thus, it is provided by statute, that "all actions by assignees shall be without prejudice to any set-off or other defence existing at the time of, or before notice of the assignment, except actions on negotiable promissory notes and bills of exchange, transferred in good faith and upon good consideration before due." 2 G. & H. 38, sec. 6.

The conveyance of the property by Stevens to the plaintiff was one of the modes known to the law, on the theory that the defendant's covenants ran with the land, of assigning those covenants to the plaintiff. And while the statute above quoted may not in terms apply to such cases, we think the analogy to be drawn therefrom justifies the conclusion that, in an action for the breach of such covenants, the real consideration may be shown, as well where the action is brought by an assignee of the covenants, as where brought by the immediate covenantee. We are of opinion, therefore, that the evidence was, in itself, admissible.

We come to the only remaining question. Was the defendant a competent witness to prove the consideration?

The fact that the defendant was a party to the action, and interested therein, did not render him incompetent. The appellant relies upon the following proviso to the second section of the act defining who shall be competent witnesses, etc., 3 Ind. Stat. 559:

"And provided further, that in all suits by or against heirs

founded on a contract with or demand against the ancestor, the object of which is to obtain title to or possession of land or other property of such ancestor, or to reach or affect the same in any way, neither party shall be allowed to testify as a witness as to any matter which occurred prior to the death of such ancestor, unless required by the opposite party or by the court trying the cause, and the assignor of the plaintiff in any such suit, where there has been an assignment of the cause of action, shall be deemed and held to be a party within this provision."

The case does not, in our opinion, come within the proviso quoted. The actions therein provided for are those the object of which is to obtain title to, or possession of, land or other property, or to reach or affect the same in some way. By this is meant, as we understand it, such actions as are designed to reach, or in some way affect, specific property, and not actions merely to recover damages for the breach of a contract, as was the case here. *Peacock v. Albin*, 39 Ind. 25.

We are of opinion that the defendant was a competent witness to prove the matters testified to by him.

The judgment below is affirmed, with costs.

A. Kilgore, R. C. Bell, J. Gavin, and J. D. Miller, for appellant.

W. March, for appellee.

HAM ET AL. v. GREVE ET AL.

APPEAL BOND.—*Suit On.*—*Pleading.*—*Clerk.*—A complaint upon a bond given on appeal to the Supreme Court alleged that the court granted the appeal and approved of the surety, that the bond was taken and approved by the clerk below, that the cause was certified to the Supreme Court, where the judgment was affirmed, and that it was still unpaid, but it did not aver that the penalty of the bond was fixed by the court, or that the court directed the time within which the bond should be filed, or that it was filed within the time, or when the transcript was filed, or that execution and other proceedings were stayed upon the judgment during the pendency of the appeal.

41	531
126	334
41	531
131	82
41	531
143	237

Ham *et al.* v. Greve *et al.*

Held, that the complaint was not sufficient on demurrer. Neither the clerk of the Supreme Court nor the clerk of the court below has power to take or approve an appeal bond when the appeal is taken in term. There was no consideration shown for the appeal bond. The question was not whether execution and other proceedings were in fact stayed on the judgment during the pendency of the appeal, but whether the bond was legally operative as a *supersedeas*.

SAME.—A complaint in such a case must show the bond to have been executed according to the statute, or that the defects were waived, either expressly or by implication.

SAME.—*Judgment Without Relief.*—A judgment on an appeal bond should not be rendered without relief from valuation or appraisement laws, where it is not so provided in the bond.

APPEAL from the Wayne Common Pleas.

BUSKIRK, J.—This was an action by the appellees against the appellants upon an appeal bond. There was a demurrer to the complaint, which was overruled, and an exception taken. There was issue, trial by the court, finding for plaintiffs, motion for a new trial overruled, and judgment on the finding. The appellants have assigned the following errors:

First. That the court erred in overruling the demurrer to the complaint.

Second. The court erred in overruling the motion for a new trial.

Third. The court erred in rendering judgment that the money should be collectible without relief from the valuation and appraisement laws.

The complaint alleges the recovery of a judgment by the plaintiffs against the defendant Ham, in the Wayne Common Pleas, May 24th, 1869, for four hundred and sixty-two dollars and fifty-one cents and costs; that an appeal was prayed to the Supreme Court, which was granted on condition of filing a bond with the defendant Railsback, as surety, who was approved by the court; that the defendants on the 9th of June, 1869, executed and filed in the clerk's office the bond in suit, in the penal sum of one thousand dollars, conditioned for the due prosecution of such appeal, and the payment of the judgment and costs, which should be rendered or affirmed therein; that said bond was taken and approved by the clerk, and said cause was certified to

the Supreme Court; that said judgment had been affirmed in the Supreme Court, and that the same was still wholly unpaid. There was prayer for judgment for seven hundred dollars.

It is insisted by counsel for appellants that in a complaint upon an appeal bond, in an appeal to this court, four things must affirmatively appear; first, that the penalty of the bond was fixed by the court; second, that the surety was approved by the court; third, that the bond was filed with the clerk within the time limited by the court; fourth, that the transcript was filed in the office of the clerk of the Supreme Court within sixty days after the filing of the bond.

The 555th section of the code regulates the taking of an appeal in term and the execution of a bond, and is as follows: "Sec. 555. When an appeal is taken during the term at which the judgment is rendered, it shall operate as a stay of all further proceedings on the judgment, upon an appeal bond being filed by the appellant, payable to the appellee, with condition that he will duly prosecute his appeal, and abide by and pay the judgment and costs which may be rendered, or affirmed against him, with such penalty and surety as the court shall approve; to be filed within such time as the court shall direct, and the transcript shall be filed in the office of the clerk of the Supreme Court within sixty days after filing the bond." 2 G. & H. 271.

Section 556 regulates the mode of taking an appeal in vacation. 2 G. & H. 272.

Sections 563 and 564 of the code, 2 G. & H. 274, provides how a stay of execution can be obtained when the appeal is taken in vacation, and are as follows: "Sec. 563. An appeal taken after the close of the term, shall not stay execution, or other proceedings in the court below, unless an order to that effect be granted by the Supreme Court in term, or by any judge thereof in term or vacation, which shall be indorsed on the transcript. The court or judge shall, at the time of making the order, direct that the appellant give bond to the appellee, with condition that he will duly prosecute his

Ham et al. v. Greve et al.

appeal, and abide by and pay the judgment and all costs which may be rendered or affirmed against him.

"Sec. 564. The appeal bond and surety may be approved by the clerk of the Supreme Court, or by the clerk of the court below. And upon the filing of the bond, execution and all other proceedings on the judgment in the court below, shall be stayed," etc.

When the appeal is taken in term, the appeal bond may be then filed and approved by the court, or it may be filed within such time as the court shall direct, but in either case the penalty of the bond must be fixed, and the surety must be approved by the court. If the bond is not filed in term, the court must fix the penalty, approve the surety, and direct in what time the bond must be filed, and the bond must be filed within the time directed, and when the transcript is filed in the clerk's office of the Supreme Court within sixty days after filing the bond, execution and all other proceedings on the judgment below are stayed for three years or until the case is decided, without any order from the Supreme Court or any judge thereof.

But the filing of the bond within the time limited by the court operates as a supersedeas for sixty days, and if the transcript is not filed within sixty days, it ceases to stay proceedings, and in such case application has to be made to the Supreme Court or some judge thereof for a supersedeas.

When the appeal is taken after the term at which judgment is rendered, execution and other proceedings on the judgment below cannot be stayed without an order from the Supreme Court or some judge thereof. In such case, the appeal bond is taken and approved either by the clerk of the Supreme Court or by the clerk of the court below.

It is alleged in the complaint that the court approved of Railsback as surety, but it is not alleged that the penalty of the bond was fixed by the court, or that the court directed in what time the bond should be filed, or that it was filed within the time directed, or when the transcript was filed, nor is it alleged that execution and other proceedings were

stayed upon the judgment below during the pendency of the appeal in this court; but it is averred that the bond was taken and approved by the clerk of the court below. As we have seen, neither the clerk of the Supreme Court nor of the court below has any power to take or approve an appeal bond when the appeal is taken in term.

In our opinion the complaint was fatally defective. The bond was not executed in the manner or with the formalities required by the statute. Nor does it appear from the complaint that there was any valid consideration for the bond.

It is well settled that an appeal bond is not essential to the taking of an appeal to this court, its only office being to stay execution and other proceedings upon the judgment appealed from. Delay of execution and other proceedings upon the judgment below constitute a valid consideration for an appeal bond. *Jones v. Droneberger*, 23 Ind. 74; *Sturgis v. Rogers*, 26 Ind. 1; *Burt v. Hættinger*, 28 Ind. 214.

It was held by this court, in *Burk v. Howard*, 15 Ind. 219, that where the court did not approve the penalty of the bond or surety, or direct when the bond should be filed, and when there was no order of the Supreme Court or judge thereof, there was no valid stay of execution.

The question is not whether execution and other proceedings were, in fact, stayed on the judgment during the pendency of the appeal in this court, but was the bond legally operative as a *supersedeas*? If it was, there was a valid consideration; if not, then the bond was without consideration and void. We are unable to determine from the allegations in the complaint, whether there was any consideration to support the bond.

The case of *Jones v. Droneberger*, 23 Ind. 74, has been cited as an authority in opposition to the views by us expressed; but we think that when that case is properly understood, it will sustain rather than oppose our views.

In that case the appeal had been taken in term, and the court had approved the penalty and surety, and had fixed the time in which the appeal bond should be filed. The

Ham et al. v. Greve et al.

bond was filed within the time and in the penalty prescribed, but with a different surety. In a suit on the bond, judgment had been rendered for the plaintiff. The defendant filed a complaint for a review of said judgment, which complaint was held bad on demurrer, and on appeal to this court that ruling was affirmed. The court held, that "the bond was for the individual benefit of the appellee; and the provisions in the statute requiring the court to approve it in term time, and the clerk in vacation, were inserted for the purpose of securing a good bond for the appellee, and of creating an arbiter to decide between the parties where they might not be able to agree as to what, in the given case, was a good bond; and the question is, cannot the parties waive the approval of the court or clerk in any given case, where their own individual interests are alone at stake, and mutually agree upon a bond? If they can, and do so, the bond given in such case is valid. Delay of execution is a good consideration for the bond. And if they can make such waiver, we must presume it was shown to have taken place in this case, in the original suit on the bond, as the evidence is not in the record, and all presumptions must be in favor of the judgment. We think the waiver could be made."

The only point decided in the above case is, that as the object of requiring an approval of the surety by the court or clerk is to provide an arbiter between the parties in case of disagreement, such approval is not essential to the validity of the bond in case the parties mutually agree upon the surety, and the appellee withholds the enforcement of his judgment in consideration of the bond so given. This does not extend to the questions of fixing the penalty of the bond or the time of filing the same. The fixing of the penalty of the bond and the filing of the same within the time directed by the court are as essential to the validity and effectiveness of an appeal prayed in term so as to stay proceedings, as is the filing of a bond within thirty days from the judgment to an appeal taken from a justice of the peace. It would hardly be pretended that if a defendant in

a judgment before a justice of the peace, should file an appeal bond after the expiration of thirty days, the surety in the bond would be held liable for such judgment, whether the plaintiff should withhold execution or not, on account of the filing of such bond. In the above case, the court state the facts: "An appeal was prayed to the Supreme Court, in term time, in a given suit. The appeal was allowed, the penalty of the appeal bond fixed by the court, the security to be given in it named and approved by the court, and the time for the filing of the bond specified. A bond corresponding was filed in time, except with different surety; the transcript in appeal was sent up to the Supreme Court; execution was withheld below, as though the appeal had been entirely regular."

The above case turned upon the doctrine of a waiver. We are not required, in the present case, to decide to what extent defects may be waived by the obligee in an appeal bond, as the party who sues on such a bond must either show that it has been executed according to the statute, or that such defect had been either expressly or by implication waived. There are no such averments in the complaint. As to what bonds are valid, and what invalid, see *Caffrey v. Dudgeon*, 38 Ind. 512.

We are of opinion that the court erred in overruling the demurrer to the complaint, for which the judgment must be reversed.

We are asked to decide a question arising upon the motion for a new trial, and as the question is in the record, and frequently arises in practice, we will do so.

The court below, in rendering judgment upon the bond, provided, that it should be collected without relief from the valuation and appraisement laws.

Section 445 of the code, 2 G. & H. 242, provides, that "no property shall be sold on any execution or order of sale issued out of any court, for less than two-thirds of the appraised cash value thereof, exclusive of liens and incumbrances, except where otherwise provided by law."

Ham et al. v. Greve et al.

It is provided by section 15 of an act concerning promissory notes, etc., 2 G. & H. 659, that "upon any instrument of writing, made within this State, or elsewhere, containing a promise to pay money without relief from valuation laws, judgment shall be rendered and execution had accordingly."

It is provided by section 381 of the code, 2 G. & H. 220, that "when a judgment is to be executed without any relief from appraisement laws, it shall be so ordered in the judgment."

It is provided by the act approved December 21st, 1858, 2 G. & H. 220, "that hereafter all judgments recovered against any sheriff, constable, or other public officer, administrator, executor, or any other person or corporation, or the sureties of any or either of them, for money collected or received in a fiduciary capacity, or for a breach of any official duty, or for money or other article of value held in trust for another, shall be collectible without stay of execution, or benefit of the valuation or appraisement laws of this State."

There are other special provisions dispensing with appraisement, in certain cases, but none of them are applicable to appeal bonds. The bond in suit contains no waiver of valuation or appraisement laws. In such case the judgment is collectible with relief. Appraisement must either be dispensed with by statute, or waived by the party in the instrument sued upon.

The court erred in providing that the judgment should be collected without relief from appraisement laws.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to grant a new trial, and for further proceedings in accordance with this opinion.

C. H. Burchenal, for appellants.

J. B. Julian and *J. F. Julian*, for appellees.

Light v. Lane et al.

LIGHT v. LANE ET AL.

REAL ESTATE.—Void Marriage.—Conveyance by Parties as Husband and Wife.

Bond of Married Woman.—A man died, leaving a widow and infant daughter.

The widow, in good faith, entered into what she believed to be a valid marriage contract, and with her supposed husband conveyed the real estate received from her former husband to A. The infant daughter married, and with her husband, also a minor, executed a title bond to A. to convey her interest in the same property, on attaining full age. The marriage of the widow was void, by reason of the prior undissolved marriage of the man with whom she supposed she had contracted marriage. Proceeding for partition of the land, said daughter and her husband being still minors.

Held, that the deed executed by the widow conveyed all her interest in the property, she being a *feme sole*, and there being no allegation of inadequacy of consideration, or that any fraud was practised by the purchaser. The third section of the statute, 2 G. & H. 348, which declares the issue of such marriage, begotten before the discovery of the disability, to be legitimate, does not change the relation of the parties to the marriage as to each other.

Held, also, that the interest of the daughter was in no way affected by the title bond to convey on arriving at full age. Without regard to the question of minority, it was sufficient that, being a married woman, she could not enter into an executory contract.

APPEAL from the Knox Circuit Court.

WORDEN, J.—This was a proceeding for the partition of certain lands described in the complaint, of which one William S. Bruce died seized. The appellant, Sanders Light, was made a party, and he set up claims to portions of the land. The cause was tried by the court, and the facts were found specially, and the conclusions of law thereon. Light excepted to the conclusions of law, and brings the cause here for revision. He has assigned for error the supposed erroneous conclusions of law.

The facts found, upon which the questions involved in this appeal arise, are as follows:

That said William S. Bruce left his widow, Elizabeth Bruce, called in this record Elizabeth Lane, and amongst other children, Isabel Riggs, intermarried with William Riggs; that after the death of Bruce, his widow, Elizabeth, intermarried at said county with one Thomas Lane, and that afterward said Thomas Lane bargained with the appellant, Sanders Light, for the sale to the latter of the interest of

Light v. Lane et al.

said Elizabeth, as widow of said deceased, in said real estate, and that said Thomas and Elizabeth executed to the appellant a deed purporting to convey to him the interest aforesaid, and acknowledged the execution thereof before a justice of the peace; that at the time of the execution of the conveyance, the said Thomas and Elizabeth were living together as husband and wife; that said Elizabeth and said Sanders then believed that she was the lawful wife of said Thomas Lane; that she made said deed, and the said Sanders accepted the same in the faith and belief that she was such lawful wife; that she is described in said deed and acknowledgement as the wife of said Thomas Lane; that in fact the said Elizabeth was not the lawful wife of said Thomas Lane, for the reason that he then had a wife living, to whom he had been married prior to his marriage with the said Elizabeth. Said Elizabeth is now divorced from Thomas.

It was further found that said William Riggs and Isabel, his wife, on, etc., executed to Sanders Light a title bond for the consideration of thirty-five dollars in hand paid, and thirty-five dollars to be thereafter paid, conditioned that they would, on arriving at twenty-one years of age, convey the interest of said Isabel, the one undivided sixth, in said land, to the said Sanders Light; that at the time of the execution of said bond, the said William and Isabel were, and still are, under twenty-one years of age, and said Light had then and there notice thereof, and they have not executed any deed in pursuance of said bond.

The court found, as a conclusion of law, "that said deed from Thomas and Elizabeth Lane to said Sanders Light was and is void as against the said Elizabeth, and conferred no title to said Light; that said title bond is void as against said Isabel Riggs, and confers no title or interest upon said Light; that the said Elizabeth Lane is the owner in fee of one undivided third," etc.; and "that said Sanders Light has no interest or estate in said lands." Judgment accordingly.

The errors assigned question the correctness of the con-

clusions of law in respect to the interest of the appellant in the land.

We are of opinion that the court erred in holding the deed from Thomas and Elizabeth Lane to be void, and that it conferred no title upon Light, and that the latter had no interest in the land.

The marriage between the said Thomas and Elizabeth, he then having a former wife living, was absolutely void without any legal proceedings to declare it so. 2 G. & H. 348, sec. 1. The third section of the same act provides, that "when either of the parties to a marriage void because a former marriage exists undissolved, shall have contracted such void marriage in the reasonable belief that such disability did not exist; the issue of such marriage begotten before the discovery of such disability by such innocent party shall be deemed legitimate." But this does not render the marriage in any sense valid. This provision does not affect the relation of the parties to such void marriage as regards each other, but only fixes the *status* of the offspring.

The marriage being thus absolutely void, the deed is as effectual to convey the interest of the said Elizabeth as if she had never entered into it. Where a widow marries a second or subsequent time, holding real estate in virtue of any previous marriage, she cannot, during such second or subsequent marriage, either with or without the assent of her husband, alienate it. 1 G. & H. 294, sec. 18.

Here was a void marriage, or, what is the same thing, no marriage at all, and the widow was in no manner restrained from alienation.

The fact that Thomas united with her in the deed, she having the right to alienate her interest, cannot have the effect of destroying the efficacy of the deed as to her.

There is no complaint that the consideration was inadequate, or that Light practised any fraud in the matter. We are of opinion that the deed executed by the said Elizabeth, in conjunction with said Thomas Lane, conveyed to the

Light v. Lane et al.

appellant, Light, the interest which the widow had in the premises.

We pass now to the interest supposed to have been vested in the appellant by the title bond executed by William and Isabel Riggs, and in this respect we are of opinion that the court committed no error. It appears that at the time of the execution of the bond, and at the time of the trial below, Riggs and his wife were both minors. It is insisted by the appellant that the contract of minors is voidable merely, and not void, and that it may be ratified or avoided when they become adults. We shall not examine the effect of the minority of the obligors, as there is another element in the case, so far as Isabel Riggs is concerned, that is decisive of it.

The land, the conveyance of which was stipulated for by the title bond, belonged to Isabel. At the time of the execution of the bond she was a married woman, and, therefore, incapable of making a valid executory contract for the conveyance of her real estate. In *Stevens v. Parish*, 29 Ind. 260, it is said that "an executory contract by the wife, or by the husband and wife, for the sale of her land, is not binding on her; nor is it in the power of the husband, or the court, to compel the wife to join her husband in a deed conveying her lands. If she voluntarily joins with her husband in a conveyance thereof by deed, her title is thereby divested. She is bound by such an executed conveyance thereof, but by no other mode of contract."

The judgment below must be reversed so far as it awards to Elizabeth Lane the interest which she, as the widow of William S. Bruce, derived from her said deceased husband, and so far as it withholds said interest from the appellant. In all other respects it must be affirmed. The judgment being reversed as to one of the appellees, and affirmed as to the others, the costs herein should be paid equally by the appellant and the said Elizabeth Lane.

The judgment is reversed as to Elizabeth Lane, and as to the other appellees it is affirmed, with costs, as above indi-

Kessler v. Myers.

cated, and the court below is directed to render judgment on the finding in accordance with this opinion.

J. C. Denny, G. G. Reiley, and W. C. Johnson, for appellant.

C. M. Allen, N. Usher, W. R. Gardiner, and S. Coulson, for appellees.

KESLER v. MYERS.

PRACTICE.—Affidavits.—Bill of Exceptions.—Where a petition was filed in the circuit court for relief from a judgment in that court, dismissing an appeal from the judgment of a justice, and the petition was overruled, and the bill of exceptions did not contain the affidavits filed in support of the petition, but in lieu thereof, the words "heretofore inserted in this record;"

Held, that the affidavits, not being properly part of the record, could not be considered by the Supreme Court.

SAME.—Transcript.—Statute.—Clerk's Duty.—The statute declares what matters shall constitute a part of the record, and how the same shall be made a part thereof, and no rule of court regulates the practice. Section 559, 2 G. & H. 273. All proper entries made by the clerk, and all papers pertaining to a cause and filed therein, and not relating to collateral matters, are by statute made parts of the record without a bill of exceptions. A motion to set aside a default is a collateral matter, and the affidavits supporting the motion are not part of the record, unless made so by order of the court, or by a bill of exceptions in which they are incorporated. The judge may sign the bill of exceptions without the affidavits being inserted, if they are identified in the paper by distinct reference, and the proper place designated for their insertion, but the clerk, in making out the transcript, must insert them in full in the bill of exceptions. If the affidavits constituted part of the record by force of the statute, the words "here insert" would be sufficient if a proper reference were made to them for identification, and they were already set out in the record.

SAME.—Appeal.—Certiorari Without Motion.—Motion for Certiorari.—At any time pending an appeal, this court, *ex officio*, may award a *certiorari*, to inform its conscience, for the purpose of affirming a judgment, but never to reverse it, or make error. On motion, supported by affidavit of diminution of the record, a *certiorari* is awarded either party.

APPEAL from the Marion Circuit Court.

BUSKIRK, J.—This was a proceeding for relief from a judg-

41	543
136	474
41	543
141	508
41	543
150	564
41	543
156	636

Kesler v. Myers.

ment by default, under section 99 of the code, as amended by the act, approved March 4th, 1867. 3 Ind. Stat. 373.

The facts are these: Myers sued Kesler before a justice of the peace and obtained judgment, from which Kesler appealed to the circuit court. The justice sent up the transcript, and the case was regularly docketed. The subsequent history of the case is shown by the following bill of exceptions in the record:

"The State of Indiana, Marion County. Civil Circuit Court, December Term, 1871.

"John Myers v. Lewis Kesler. Appeal from John F. Turpin, J. P., Wayne Township.

"Be it remembered that on the 14th day of the September Term, 1871, of this court, being the 3d day of October, 1871, this cause was called for trial, and the defendant, being called, comes not, but makes default, and thereupon his appeal was dismissed.

"And on the 2d day of the December Term, 1871, of said court, being the 5th day of December, 1871, the defendant filed his petition for relief from said judgment of dismissal and affidavits in support thereof, to set aside his default herein and to reinstate the cause, which petition and affidavits are in these words:

(Heretofore inserted in this record.)

"And the court having considered said petition and motion, afterward, on the 12th day of said December Term, 1871, overruled the same and refused to set aside said default and reinstate said cause, to which decision and judgment the defendant excepted, and prays that this, his bill of exceptions, may be made a part of the record in this cause, which is done accordingly.

"Signed and dated this 3d day of February, 1872.

"JOHN S. TARKINGTON, [SEAL.]

"Judge M. C. C."

The following entry of the clerk below appears in the transcript: "And afterward, to wit, at the December Term, 1871, of said court, on the third judicial day of said term,

that being the 6th day of December, 1871, and before the honorable judge aforesaid, the following further proceedings were had in said cause, viz.: Comes the defendant and moves the court to reinstate this cause upon the docket of this court and files the following affidavits, to wit:—

The clerk then copies into the transcript the affidavits of Lewis Kesler, Fabius M. Finch, and Charles Sage.

The question presented for our decision is, whether such affidavits are properly in the record and can be considered by us.

It is too well settled to admit of argument or justify a reference to the long and unbroken line of decisions in this court, that the affidavits could only become a part of the record by a bill of exceptions.

The real question, therefore, is, have the affidavits been made a part of the bill of exceptions? This question was very fully considered by us in the recent decision in the case of *Stewart v. Rankin*, 39 Ind. 161.

It is provided by section 343 of the code, 2 G. & H. 209, that "it shall not be necessary to copy a written instrument, or any documentary evidence into a bill of exceptions; but it shall be sufficient to refer to such evidence, if its appropriate place be designated by the words 'here insert.'"

In the above cited case, we held, that where the purpose was to incorporate into a bill of exceptions a written instrument or documentary evidence, and such bill referred to such written instrument or documentary evidence, and designated its appropriate place by the words "here insert," the clerk, in making out the transcript, was authorized and required to insert in the appropriate place in the bill of exceptions such written instrument or documentary evidence; and we further held that where a written instrument properly and legally constituted a part of the record without being made such by a bill of exceptions, and where it had already been copied into the transcript, the clerk was not required to again copy such instrument into the bill of

Kesler v. Myers.

exceptions, but might make the same a part thereof, by inserting in the designated place a reference to the page and line of the transcript where the same could be found.

We further held, it being applicable to that case, though not to this, that where the purpose was to embody into a bill of exceptions the parol testimony, the judge was not authorized to sign such bill of exceptions, until the testimony was written out in full in such bill of exceptions, and he had satisfied himself, either by a personal examination of such testimony or by the consent of opposing counsel, that it spoke the truth; and that if it was not true the judge should correct it or suggest the correction to be made; and that when the bill was made to speak the truth, he should sign it, and not before.

Adhering, as we do, to the rulings in that case, we are compelled to hold that the affidavits in the case in judgment do not constitute a part of the record. They did not constitute a part of the record, without being made such by a bill of exceptions. The clerk, therefore, had no right to copy them into the transcript, and they not being properly a part of the transcript, he could not make them a part of the bill of exceptions by referring to the place where they could be found. He should have copied them into the bill of exceptions, where, he says "(heretofore inserted in the record)."

The mistakes of clerks and the want of attention on the part of counsel compel us, in many cases, against our wishes, to dispose of cases on technical points, instead of deciding them on their merits. But an adherence to established rules of practice is essential to the due administration of justice. The affidavits not being in the record, we must presume that the ruling of the court below was correct.

Judgment affirmed, with costs.

ON PETITION FOR A REHEARING.

A rehearing is asked in this case upon three grounds.

First. That the court erred in holding that the affidavits

filed in support of the motion to set aside the default were not properly and legally in the record.

Second. That it was the duty of the court, when it discovered the mistake of the clerk, to have required the clerk to correct such mistake.

Third. That as the appellant and his counsel had done their whole duty in the premises, the court should not visit upon them the consequences of the ignorance or malice of the clerk.

The counsel for appellant assume that the ruling in this case was made upon some rule adopted by this court, and then proceed to denounce such rule as harsh, unreasonable, and technical, and as having no foundation in right or equity. The assumption is wholly unfounded. There is not now, and never has been, in this court, a rule of court regulating the practice in such cases. The whole subject is regulated and controlled by a positive statute. This is an appellate court for the review and correction of the errors of the inferior courts. We possess no original jurisdiction. We do not try cases *de novo*. Nor can any original paper be sent to this court. The record in this court is composed of a transcript of the original papers and the entries made by the clerk in the progress of the cause, under the supervision and with the sanction of the judge presiding at the trial. The legislature has, in plain and unambiguous language, declared what matters shall constitute a part of the record, and how the same shall be made a part thereof. Section 559 of the code reads as follows:

"Sec. 559. All proper entries made by the clerk, and all papers pertaining to a cause, and filed therein, (except a summons for the defendant, where all the persons named in it have appeared to the action, and summons for witnesses, depositions, and other papers which are used as mere evidence) are to be deemed parts of the record; but a transcript of motions, affidavits, and other papers, when they relate to collateral matters, and depositions, and papers filed as mere evidence, shall not be certified, unless made a part of the record by exception, or order of court, and directed

Kesler v. Myers.

to be certified by the appellant. Neither shall the clerk certify any pleading first filed, when there is an amended pleading of the same matter subsequently filed, embracing all the pleading first filed, and the amendments thereto; but shall certify such amended pleading only. Every paper and pleading above excepted, may be made a part of the record by exceptions, or order of the court, on motion. If the clerk shall certify matter not material to the determination of the appeal, the Supreme Court may direct the person blameable therefor to pay the costs thereof." 2 G. & H. 273.

By the above quoted section of the code, all proper entries made by the clerk constitute a part of the record. These entries are usually made by the clerk from the minutes made by the judge upon his docket, and they are required to be read in open court, and if approved by the court, the judge must sign the record. The duty of the clerk is to enter the orders of the court.

It was said by this court, in *Hasselback v. Sinton*, 17 Ind. 545, that "it is no part of the duty of a clerk to place among the orders of the court, which he is directed to enter, the reasons or causes which influenced the court in directing such order. It would greatly incumber a record to undertake to place upon the order book all the facts leading to every order made. If the ruling is objected to, it should go among the records by a regular exception taken and signed."

The ruling in the above case has been steadily and uniformly adhered to by this court.

It has been decided by this court, in many cases, that under the phrase, "all papers pertaining to a cause and filed therein," are embraced the complaint, answer, reply, demurrers, and all instruments of writing upon which the pleading is based, and which are filed with and made a part of such pleading. *Miles v. Buchanan*, 36 Ind. 490.

All proper entries made by the clerk, and all papers pertaining to a cause and filed therein, and not relating to collateral matters, are, by force of the statute, made a part of

the record on an appeal to this court, and are not required to be made such by a bill of exceptions.

We reproduce a portion of the above quoted section of the code: "But a transcript of motions, affidavits, and other papers, when they relate to collateral matters, and depositions, and papers filed as mere evidence, shall not be certified, unless made a part of the record by exception, or order of court, and directed to be certified by the appellant."

In the case under examination the appellant made a motion to set aside a default which had been entered against him, which was a collateral matter. The motion had to be supported by affidavits. Such motion and affidavits did not become a part of the record by force of the statute, but had to be made such either by an order of the court, or by being incorporated in a bill of exceptions. But the clerk had no power to certify such motion and affidavits, although made a part of the record in one of the modes above indicated, unless he was so directed by the appellant. When such papers are certified, the presumption would be that it was done by the direction of the appellant. It was said by this court, in *Blizzard v. Phebus*, 35 Ind. 284, that "it has been so long and repeatedly decided by this court that affidavits filed during the progress of a cause can only be made a part of the record by a bill of exceptions, that it is hardly worth while to refer to such decisions, but we will refer to a few of the later decisions. *Round v. The State*, 14 Ind. 493; *Leyner v. The State*, 8 Ind. 490; *Taylor v. Fletcher*, 15 Ind. 80; *Cochran v. Dodd*, 16 Ind. 476; *Murphy v. Tilly*, 11 Ind. 511; *Wilson v. Truelock*, 19 Ind. 389; *Merritt v. Cobb*, 17 Ind. 314; *Hasselback v. Sinton*, 17 Ind. 545; *Horton v. Wilson*, 25 Ind. 316; *Whiteside v. Adams*, 26 Ind. 250; *Bell v. Rinker*, 29 Ind. 267; *Fisher v. Ewing*, 30 Ind. 130; *Potter v. Stiles*, 32 Ind. 318."

We think it should be regarded as settled that the motion and affidavits, in the case in judgment, could only be made a part of the record, either by an order of court or by a bill of exceptions. There was no order of court making

Kessler v. Myers.

them a part of the record. The appellant attempted to make them a part of the record by a bill of exceptions, and we are required to decide whether they were so made a part of the record.

The practice was well settled at common law, and under the statutes of this State, prior to the code of 1852, that a judge had no right to sign a bill of exceptions, the purpose of which was to put in the record a written instrument or documentary evidence until such written instrument or documentary evidence had been written out in full in such bill of exceptions. *Huff v. Gilbert*, 4 Blackf. 19; *The State Bank v. Brooks*, 4 Blackf. 485; *Livingood v. Livingood*, 6 Blackf. 268; *Spears v. Clark*, 6 Blackf. 167; *The Vincennes University v. Embree*, 7 Blackf. 461; *Doe v. Makepeace*, 8 Blackf. 575; *Mills v. Simmonds*, 10 Ind. 464.

This court in the case last cited says: "The clerk, in making a transcript of the record for this court, has inserted what purport to be depositions given in evidence on the trial; also instructions given, and an instruction refused by the court. But these alleged rulings are not properly before us; because, under the rules of practice, as they stood when these exceptions were taken, the clerk had no right to make such insertions in a bill of exceptions, unless authorized to do so by agreement of the parties entered upon the record. The depositions, charges given, and charge refused should have been copied into the bill at the time it was signed by the judge. 4 Blackf. 19; 6 Blackf. 167; 7 Blackf. 461. There being, then, no proper bill of exceptions upon which to found the assigned errors, the appeal must be dismissed."

By the phrase "the rules of practice" was meant the rules of practice prescribed by the legislature, for this court had established no rules on the subject, and possessed no power to do so; for bills of exceptions are made in the lower courts, and can only be amended or corrected by such courts.

The law in this regard was changed by the code. Section 343 of the code reads as follows:

"Sec. 343. The party objecting to the decision must except

at the time the decision is made; but time may be given to reduce the exception to writing, but not beyond the term, unless by special leave of the court. It shall not be necessary to copy a written instrument, or any documentary evidence into a bill of exceptions; but it shall be sufficient to refer to such evidence, if its appropriate place be designated by the words 'here insert.'

The only change made by the above section is that a judge may now sign a bill of exceptions in blank as to the instrument to be inserted, where the purpose is to embody a written instrument or any documentary evidence, where such evidence is referred to and its appropriate place designated by the words "here insert." The object and effect of the section was to authorize the clerk, after the bill had been signed, and when he was making out a transcript, to insert in the place designated such written instrument or documentary evidence. Before the adoption of the code the instrument had to be inserted in the bill of exceptions before it was signed by the judge, but since it may be inserted by the clerk, in making out the transcript. But the insertion must be made in the bill of exceptions, or it will constitute no part of the record. The instrument to be inserted should be so referred to and described by the names of the parties thereto, by letters or numbers, or some specific designation, so that the clerk can with certainty know what instrument is intended to be inserted. The following designations would be sufficient: the deposition of Robert Jones; the deed from John Doe to Richard Roe; the agreement between John Smith and James North; the affidavits of William Sikes, John Brown, and James Black; exhibits A., B., and C., filed with the complaint; exhibits 1, 2, and 3, filed with the answer. Unless there is some such designation, the clerk will not know what instrument was intended, and he might by accident or design insert the wrong paper.

The signature of the judge to the entries in the order book and his signature to the bill of exceptions, with the certificate of the clerk, under the seal of the court, that

Kessler v. Myers.

the transcript contains a full, true, and complete transcript of all the entries and papers in the cause, afford sufficient evidence that the record is correct. What evidence have we that the affidavits copied into the transcript are the ones that were read in support of the motion? They were not entered upon the order book, which was signed by the judge. The bill of exceptions does not in any manner refer to or describe the affidavits. They do not come to us over the signature and seal of the judge. If clerks can thus make a record, there will be no safety for parties litigant; for if we are bound to recognize the unauthorized statement of the clerk, he can impose upon us any record he may make up and send to us. The statute says that a bill of exceptions shall be signed by the name and attested with the seal of the judge, to which shall be added the certificate of the clerk and the seal of the court. Counsel for appellant ask us to disregard the requirements of the statute, and to accept and treat as a part of the record the affidavits which the clerk has, without authority and in plain violation of both the letter and spirit of the statute, copied into the transcript. The above quoted section expressly provides, that motions and affidavits shall not be certified unless made a part of the record by exception, or order of court.

The act of the clerk being unauthorized and illegal, we cannot recognize and act upon it. His copying the affidavits into the transcript no more made them a part of the record than would the act of a county recorder in copying upon the deed record an unacknowledged deed, or an instrument not required by the law to be recorded.

Where an instrument of writing is a part of the record by force of the statute, and has been once copied into the transcript, and is afterward used as evidence, and is referred to in a bill of exceptions with the words "here insert," the clerk need not again insert it in the bill of exceptions, but may refer to the line and page of the record where it may be found. This is settled by the case of *Smith v. Lisher*, 23 Ind. 500. ELLIOTT, J., speaking for the court, says: "True,

a bill of exceptions purports to contain all the evidence given in the cause, and the undertaking is not copied into it; it is, however, copied into that part of the record containing the complaint; and the bill of exceptions contains this statement: 'The plaintiff, to sustain the issue on his part, introduced in evidence the writing and judgment mentioned in the complaint.' No other writing than the bond or undertaking on which the action is founded is mentioned in the complaint, and as a copy of it is set out in the record with the complaint, we think the reference to it in the bill of exceptions is sufficient, and dispenses with the necessity of again copying it into the record."

The ruling in the above case was followed by this court in the case of *Stewart v. Rankin*, 39 Ind. 161, where it is said: "In making out a bill of exceptions, where the purpose is to make a part of the record a written instrument or documentary evidence, it is not necessary to copy such written instrument or documentary evidence into the bill of exceptions; but it shall be sufficient to refer to such instrument or evidence, if its appropriate place be designated by the words 'here insert,' and when the clerk makes out the transcript he should fill the blank with the written instrument or documentary evidence referred to. If the paper referred to legitimately constituted a part of the record, and has already been set out in the transcript, the clerk need not again copy it into the bill of exceptions, but may refer to the page and line of the transcript where it may be found. 2 G. & H. 209, sec. 343; sec. 559 of the code, 2 G. & H. 273; *Smith v. Lisher*, 23 Ind. 500."

The cases of *Miles v. Buchanan*, 36 Ind. 490, and *Kennedy v. The State*, 37 Ind. 355, are very much in point.

It is conclusively settled by the above cases, that to make a written instrument or documentary evidence a part of the record, such instrument or evidence must be copied into the bill of exceptions, at the place designated by the words "here insert," unless such instrument or evidence is made a part of the record by force of the statute, and has already

Kessler v. Myers.

been properly copied into the record. The ruling in *Smith v. Lisher, supra*, and which we have followed in several cases, was based upon the ground that the instrument constituted a part of the record, and had been previously copied into the transcript. In such case, the clerk does not make it a part of the record, and there is no danger of his putting into the record a paper which ought not to be there. The legislature has very carefully guarded against any tampering with the records which come to this court. This was necessary, to protect the rights of parties litigant and prevent the commission of the grossest frauds. It is our duty to give full force and effect to the expressed will of the legislature, and in so doing we are not influenced by any formal or technical considerations. The powers and duties of this court do not seem to be fully or accurately understood by many persons. Sections 4 and 5 of article 7 of our state constitution read as follows:

"Sec. 4. The Supreme Court shall have jurisdiction, co-extensive with the limits of the State, in appeals and writs of error, under such regulations and restrictions as may be prescribed by law. It shall also have such original jurisdiction as the General Assembly may confer.

"Sec. 5. The Supreme Court shall, upon the decision of every case, give a statement in writing of each question arising in the record of such case, and the decision of the court thereon."

By the fifth section we are only authorized and required to decide such questions as arise in the record of the case. By the fourth section we are required to be governed by "such regulations and restrictions as may be prescribed by law."

The law-making power of the State has established regulations by and under which appeals shall be taken to this court, and among such regulations is one prescribing what matters shall constitute the record, and how the same shall be made a part thereof, and such legislation acts as a restriction and limitation upon the powers of this court. We have

no power to add to or take from such regulations. Our duty is plain and simple. It is prescribed by the constitution and laws of the State. We can only decide such questions as arise in the record in the case under the regulations and restrictions prescribed by law. If we should decide a question not arising in the record, we would be guilty of usurpation of power, and our decision of such question would be an *obiter dictum*.

We are very clearly of the opinion that the motion and affidavits constitute no part of the record, and that consequently no question arises in the record as to the correctness of the ruling of the court below.

We proceed to consider and decide whether it was the duty of this court, upon discovering the defect in the record, to award, upon its own motion, a *certiorari* to the clerk and require him to correct the record.

It is a general rule that, at any time pending an appeal or writ of error, whether before or after errors assigned, or after *in nullo est erratum* pleaded, the court, *ex officio*, may award a *certiorari* to inform their conscience, to affirm a judgment, but never to reverse it, or make error. Tidd Practice, 1174; 2 Saund. 101, notes *s* and *t*; *Franklyn v. Reeves*, Cas. temp. Hardw. 118; *Brown v. Osborne*, 1 Blackf. 32; *Bannister v. Allen*, 1 Blackf. 414; *Colerick v. Hooper*, 3 Ind. 316; *Jones v. Van Patten*, 3 Ind. 107; *Doe v. Owen*, 2 Blackf. 452; *Songer v. Walker*, 1 Blackf. 251; *Gatling v. Newell*, 12 Ind. 116; *State v. Pearce*, 14 Ind. 426.

The appellant was seeking a reversal of the judgment. We possessed no power to award a *certiorari* to enable us to reverse the judgment. We could and would have awarded a *certiorari* upon the application of the appellant supported by affidavit showing a diminution of the record, but no such application was made. We could not, with propriety, make any suggestion to the parties or counsel as to the condition of the record. We are prohibited by a positive statute and by public policy, from giving any counsel or advice

Kesler v. Myers.

about any cause pending in court. We must decide each case upon the record presented.

The third reason assigned for a rehearing presents for our decision a question of great delicacy; but, inasmuch as it has been pressed upon our consideration, we shall not shrink from the responsibility imposed.

The appellant seems to be without fault, as he employed very able and competent attorneys to conduct and manage his cause for him; but in our opinion they omitted one very important and essential duty. They knew that the clerk was neither learned in the law nor skilled in making out transcripts for this court. They also knew that since the abolition of a complete record, it was a question of great nicety and difficulty to determine what should go into the transcript and the order in which the several parts should be stated. They gave the clerk only a general verbal direction about making out the transcript. The better and safer practice is for counsel to give written directions specially pointing out what shall be put in the record. Secs. 558 and 559 of the code, 2 G. & H. 273; *Miles v. Buchanan*, *supra*. The errors are assigned by the counsel for the appellant and in their handwriting. We may, therefore, assume that the record was delivered to them by the clerk after it was made out and before it was filed in this court. The counsel should have examined the record and seen that it was correct before they made the assignment of errors and filed the record in this court. The error assigned called in question the correctness of the ruling of the court below in overruling the motion to set aside the default. We could not reverse the ruling of the court below, unless the affidavits were properly before us; for in the absence of any showing, we would indulge the presumption that the ruling of the court below was correct. It was, therefore, the duty of counsel to examine the record and see whether it was correct and would present the question raised by the assignment of errors. We cannot decide any question that is not assigned for error. The record may be full of the most glaring errors, and yet

if they are not assigned for error, or the record does not present the questions, we must affirm the judgment.

Counsel for appellant admit in their petition for a rehearing that they did not examine the record, but relied upon the accuracy of the clerk. They cannot thus relieve themselves from responsibility. Counsel who assert that error exists and ask a reversal of judgment must see to it that the record presents the questions sought to be decided. We lay it down as a broad proposition that an attorney should never file a record without its examination.

But the duties of counsel for appellant do not terminate with filing a correct record, making an assignment of errors, and the filing of a brief; they are simply suspended until counsel for appellee files his brief. Counsel for an appellant should never fail to examine the brief for appellees. We can make the reason for this plainer by illustration. The error complained of consists in sustaining a demurrer to the complaint. The sufficiency of the complaint is argued in the brief for appellant. It is shown in the brief for the appellee that although the court may have erred, the error is not available, because the record does not show that the appellant excepted to the ruling of the court. Or suppose that the error relied upon was the overruling of a motion for a new trial. To present such a question, the evidence must be in the record by a bill of exceptions. The questions are argued by counsel for appellant upon the assumption that the bill of exceptions is properly in the record. Counsel for appellee show that time was given beyond the term to file a bill of exceptions embodying the evidence, and that the transcript does not show when the bill was filed, and that consequently no question arises in the record as to the correctness of the overruling of the motion for a new trial. Now, in point of fact, the record below shows in the first case supposed, that there was an exception to the sustaining of the demurrer; and in the second, when the bill of exceptions was filed. By an application for a *certiorari*, the record

Kesler v. Myers.

could be perfected and the cases decided on their merits. Many other instances are of daily occurrence. Besides, questions not argued in the brief for appellant are sometimes presented in the brief for appellee, which should be replied to. Again, attorneys for appellee frequently omit to file any brief, and we are left to decide the case upon the brief for appellant, or we are compelled to perform labor which should be done by counsel for appellee. Then again, appellants perfect their appeal far enough to obtain a supersedeas, but take no steps to brief or submit the cases. Finally, the appellees have the appellants defaulted, and submit the cases and file briefs, but no brief is filed by appellants. When by reason of defective records and the failure of counsel to make proper assignments of error, we are deprived of the power of deciding cases upon their merits, it is sometimes supposed by counsel, as in the present case, that we adhere to forms and are governed by technicalities. It is neither the fault of the law nor of the courts that all cases are not decided upon their merits, but it results from the want of accurate knowledge on the part of clerks, and the carelessness and neglect of duty on the part of counsel.

The very careful examination which we have given to the petition for a rehearing has convinced us that our original judgment was right, and that we could not have decided otherwise without a flagrant disregard of a positive statute, which was passed in obedience to the requirements of the constitution, and was intended as a "regulation and restriction" upon the powers of this court.

The petition for a rehearing is overruled.

F. M. Finch and *J. A. Finch*, for appellant.

L. Barbour and *C. P. Jacobs*, for appellee.

Gavin et al. v. Graydon.

GAVIN ET AL. v. GRAYDON.

DECEDENTS' ESTATES.—*Petition to Sell Lands in Two Counties.—Publication of Notice.*—Where lands situated in Ripley county were sold in the course of administration, on petition of the administrator in Decatur county to sell other lands lying in Decatur county, with the lands situated in Ripley county, it was not necessary that the notice of the petition to sell should be published in Ripley county, the administration being in Decatur county, where publication was made.

SAME.—*Jurisdiction of Common Pleas to Try Title.—Conclusiveness of Judgment.*—Where, after the land had been struck off, but before confirmation of the sale, an heir of the deceased, against whom publication had been made appeared and contested the title of the estate to one undivided half interest in the property in Ripley county, alleging that he had conveyed to the deceased one undivided half interest only in said land, and that the deed had been fraudulently altered so as to convey the entire interest therein, and thereupon an issue was formed and tried, resulting in a finding that the deed had not been altered, and the sale was confirmed;

Held, that the court of common pleas had jurisdiction to try the title, and that the finding was conclusive on the heir, and could not be attacked in a proceeding in the circuit court against the purchaser.

SAME.—The record of a domestic court of general jurisdiction need not show affirmatively jurisdiction over the persons of the parties, to authorize its introduction in evidence in a collateral proceeding. An application to sell land in the course of administration stands upon the footing of an ordinary adversary judicial proceeding in a court of superior jurisdiction, and where jurisdiction has once been acquired, subsequent errors will not subject the proceeding to collateral attack.

SAME.—*Appearance.—Collateral Proceeding.*—The heir having appeared after the sale and made his objection in hostility to the title of his ancestor, and that objection having been overruled, and the sale confirmed, and the purchase-money paid, he was concluded by that judgment, as long as it stood unreversed, and he could not be heard to make other objections to the proceedings afterward.

EVIDENCE.—*Judgment.—Estoppel.*—Where a judgment is given in evidence, it is as conclusive in its effect as if it were specially pleaded by way of estoppel. The conclusiveness of a judgment rests not upon the doctrine of estoppel, but upon the ground that the whole community have an interest in holding the parties conclusively bound by the results of their own litigation.

APPEAL from the Ripley Circuit Court.

OSBORN, C. J.—This was an action brought by the appellee, Eric M. Graydon, against the appellants to recover the possession of the undivided half of real estate in Ripley county.

The appellants answered by a general denial, and also a

41	559
125	384
126	596
41	559
140	441
41	559
151	191
41	559
153	654
41	559
156	614
156	617

Gavin et al. v. Graydon.

paragraph setting up the proceedings in the court of common pleas of Decatur county for the sale of the said land on the petition of the administrator of the estate of Gustavus B. Graydon, deceased.

To the last paragraph a demurrer was filed and sustained, to which exceptions were taken.

The cause was tried by the court, resulting in a finding for the appellee. A motion for a new trial was filed, which was overruled, to which exception was taken, and final judgment rendered for the appellee on the finding.

The evidence shows that on the — day of —, the appellee was the owner in fee simple of the real estate in controversy; that on that day he and his wife, Ebba, executed a deed of conveyance to Gustavus B. Graydon for an interest in the land. The deed was properly acknowledged and recorded; as recorded, it was for the entire interest in the land.

On the — day of —, Gustavus B. Graydon died, intestate, without issue, and leaving the appellee, his father, Ebba, his mother, and his brother, his sole and only heirs. Cortes Ewing took out letters of administration upon his estate in the county of Decatur, and in the court of common pleas of that county filed his petition to sell the real estate situated in the counties of Decatur and Ripley, including the land in controversy. The petition was in the usual form, containing the usual and proper averments. Proper notice was given, and an order for the sale of the real estate made by the court, to sell at private sale, and, after notice, the land was sold to James Gavin, one of the appellants, for one thousand two hundred dollars, that being its full appraised value. We have examined the record of the proceedings, and find them regular. On the return of the sale by the administrator, the appellee appeared and objected to its confirmation. He filed his objections, in which he stated that the deed which he executed to his son, Gustavus, had been altered after its execution, without his knowledge or consent; that when it was executed, it was for

the undivided half of the land. As an excuse for not appearing and making defence before the order of sale was made, he alleged that he had no actual notice of the pendency of the petition until after the sale of the land to Gavin.

The court allowed him to make his defence. The administrator filed a denial to the allegations in the petition, and the issue was tried by the court. After hearing the evidence, the court found against the appellee, that the deed had not been altered as alleged, confirmed the sale, and ordered a deed to be made. Afterward, a deed was made by the administrator to the purchaser, under which he and the other appellants now hold possession of, and claim title to, the land, and actually exclude the appellee therefrom.

Although the court sustained a demurrer to the second paragraph of the answer, the appellants were permitted to introduce in evidence the proceedings of the common pleas court ordering the sale of the land, together with the administrator's deed therefor.

After the introduction of the proceedings of the common pleas court in evidence, the court, over the objection of the appellants, allowed the appellee to introduce evidence to show the alteration of the deed.

The appellants insist that the proceedings and judgment of the court of common pleas were conclusive, and that it was not competent for the appellee to introduce any evidence to impeach it by showing title in himself or any alteration of the deed. The appellee, on the other hand, contends that the court of common pleas had no jurisdiction to try the title of the land, or in any manner to adjudicate or determine the question of the alteration of the deed.

Sec. 4, 2 G. & H. 20, confers upon courts of common pleas original exclusive jurisdiction "of all matters relating to the settlement and distribution of decedents' estates."

Sec. 75, page 506, provides, that "whenever any executor or administrator shall discover that the personal estate of the decedent is insufficient to pay the liabilities thereof, the

Gavin *et al.* v. Graydon.

court having jurisdiction shall order to be sold the whole or any part of the real estate of the deceased, upon such executor or administrator filing a petition therefor," setting forth, among other things, "a description of the real estate of the deceased, liable to be made assets for the payment of his debts; * * the title which the deceased had therein at his death; the names and ages of the heirs, legatees, or devisees, if any, of the deceased."

After providing for notice of the pendency of the petition, and of the time and place of hearing, and some other matters, it is provided in section 81, page 508, that "such executor, administrator or creditor, upon the hearing of such petition, may be examined under oath, witnesses be compelled to attend and testify, and depositions be taken touching the same, under the usual regulations of law; and if the facts set forth in the petition appear to be true, the court shall grant an order empowering such executor or administrator to sell the whole or so much of the real estate as is necessary to pay such debts, as the interest of the estate may require."

Exclusive jurisdiction is conferred upon the court to order the sale of real estate, and it seems to us that the power to make the order carries with it the right to determine the title. *Wolcott v. Wigton*, 7 Ind. 44; *Holliday v. Spencer*, 7 Ind. 632; *Fleming v. Potter*, 14 Ind. 486; *Bourgette v. Hubinger*, 30 Ind. 296; *Simpson v. Pearson*, 31 Ind. 1.

The statute requires that the administrator shall allege in the petition what title the decedent had in the land at his death. It requires the court to inquire into the truth of the facts set forth in the petition; and for that purpose the administrator may be examined under oath, witnesses compelled to attend and testify, and depositions taken touching the same under the usual regulations of law. The statute, we think, contemplates a trial of all the facts alleged in the petition; that the statements may be denied, or confessed and avoided; that issues of law and fact may be formed and tried. *Riser v. Snoddy*, 7 Ind. 442. Whether the allegations are denied or not, we think the court ought to be satisfied

that the facts set forth in the petition are true before it grants an order of sale. *Martin v. Starr*, 7 Ind. 224.

The petition or complaint made the persons named as heirs defendants. It charged that the decedent died seized in fee simple of the land, and that the appellee claimed or held as his heir. The statute makes no provision for personal service of summons. The only notice provided for is a constructive notice. What effect the proceedings would have upon the rights claimed, otherwise than by descent—that is, rights and interests claimed in hostility to the alleged ancestor—if the party named as heir did not appear and assert them, we need not inquire in the case.

The appellee appeared and gave the court jurisdiction over his person, and disputed a necessary allegation in the petition, the title of the decedent at the time of his death. The court had full and complete jurisdiction of the person of the appellee and of the subject-matter, and its adjudication was binding upon the parties. If the determination had been in favor of the appellee, only the undivided half of the land could have been sold under the order of the court; and as the entire interest had been sold, the sale would have been set aside and the order authorizing it vacated or modified so as to direct the sale of the undivided half of the land.

The appellee also contends that the record of the proceedings in the common pleas does not sufficiently show that the proper notice was given of the pendency of the petition. We think otherwise. It appears that the notice required by the statute was given. It was not necessary that the notice should be given in a newspaper published in Ripley county. The petition was pending in the common pleas of Decatur, and that was the county in which to publish the notice. It is not necessary to the validity of the proceedings of a domestic court of general jurisdiction that the record should show affirmatively that notice was given when the record is attacked collaterally, and when nothing appears in it inconsistent with the fact of notice having been given.

Gavin *et al.* v. Graydon.

Horner v. Doe, 1 Ind. 130; *Doe v. Harvey*, 3 Ind. 104; *Gerrard v. Johnson*, 12 Ind. 636.

An application to sell lands in the course of administration stands upon the footing of an ordinary adversary judicial proceeding in a court of superior jurisdiction, and where jurisdiction has been acquired in such a proceeding, subsequent errors in the course of its exercise will not subject the judgment to successful collateral attack. *Spaulding v. Baldwin*, 31 Ind. 376; *Dequindre v. Williams*, 31 Ind. 444; *Jackson v. Robinson*, 4 Wend. 436; *Jackson v. Crawfords*, 12 Wend. 533.

The appellee appeared in the common pleas, and asked and obtained leave to try the question of title, after the sale and before confirmation. He made no objection to any of the proceedings, pointed out no omission. His sole objection to the confirmation was, that he owned the undivided half of the land in hostility to Gustavus B. Graydon, and not as his heir. If the court erred in permitting him to make the defence at that time, he cannot avail himself of the error. We think the trial ought to have the same effect as if it had taken place before the order of sale. We also think that, having appeared and filed objections to the confirmation, he ought not to be permitted to make others after the sale has been confirmed, the purchase-money paid, and the deed executed by the administrator, especially collaterally.

The judgment of the court, that the deed had not been altered, and that Gustavus B. Graydon, at his death, was seized in fee simple of the real estate, is conclusive against the appellee, and until that judgment is reversed, or otherwise vacated, he cannot be heard in court to contradict it.

The appellants pleaded the judgment as an estoppel, and if it was necessary to plead it to make it conclusive against the appellee, the court committed an error in sustaining a demurrer to it. Under the general denial the appellants could give in evidence every defence to the action. 2 G. & H. 283, sec. 596.

It is well settled that, when pleaded, the judgment is con-

clusive. But whether it is so or not, when given in evidence under the general denial, has been doubted. It is also settled that when the party has had no opportunity to plead the estoppel in bar, and it is offered in evidence, it is equally conclusive as if it had been pleaded. 1 Greenl. Ev., sec. 531. Mr. Greenleaf, in the section referred to, concludes that "notwithstanding there are many respectable opposing decisions, the weight of authority, at least in the United States, is believed to be in favor of the position, that where the former recovery is given in evidence, it is equally conclusive, in its effect, as if it were specially pleaded by the way of estoppel." Sec. 531, *supra*, and note. Phillipps Ev. part 2, Cowen & Hill's notes, 29, note 20.

It is denied that the doctrine of estoppel is strictly applicable to the case of a judgment. "An estoppel is always something personal—the party is estopped from recovering his claim, or proving his defence, by some act in law, or in deed, or *in pais*, which precludes him from going beyond it, and proving all the case. It always arises from the act of the party estopped by it; but if the opponent, instead of relying on this act, will go beyond it, and put the cause at issue on other, and especially anterior, facts, the estoppel, being waived by him who had a right to avail himself of it, ceases to operate. But a former trial, verdict and judgment is not the act of the party, but of the tribunal which decided it, and to call it an estoppel, is a misapplication of terms; it has not the distinguishing mark of an estoppel; it is not the consequence of some act of the party bound by it; it is a bar to future recovery in any court, on the same point, between the same parties or privies, until reversed." HUSTON, J., 17 S. & R. 319.

The conclusiveness of the judgment rests not upon the doctrine of estoppel, but upon the ground that the whole community have an interest in holding the parties conclusively bound by the result of their own litigation; that the peace and order of society require that when a matter has been once adjudicated and settled, this puts an end to all further liti-

Gavin et al. v. Graydon.

gation on account of the same matter, and becomes the law of the case, which cannot be altered, and is not only binding upon the parties, but upon the courts and juries. *Phillipps and Greenl., supra.*

It is also said that when the parties are not bound to plead specially, the record of a former recovery is equally conclusive as evidence binding the parties, court, and jury.

An estoppel is a preclusion in law which prevents a man from alleging or denying a fact in consequence of his own previous act, allegation, or denial of a contrary tenor; it is when a man is concluded by his own act or acceptance to say the truth. *Bouv. Law Dict., tit. Estoppel.*

A judgment operates as an estoppel, it is true, but not on account of the act of the party. It is because it is a judgment, a settlement of the matters in controversy by a court of competent jurisdiction; and we think the weight of authority and reason is in favor of holding that where a judgment is given in evidence, it is equally conclusive in its effect as if it were specially pleaded by way of an estoppel.

Our conclusion is that the judgment was properly introduced in evidence; that the evidence offered by the appellee to show that the deed had been altered and title in the appellee was improperly admitted; that the judgment of the common pleas court of Decatur county was conclusive against the appellee on the question of the title to the land, as between him and the purchaser and his vendee under the order of that court.

The judgment of the said Ripley Circuit Court is reversed, with costs; cause remanded, with instructions to said court to grant a new trial, and for further proceedings in accordance with this opinion.

H. W. Harrington, J. D. Miller, J. Gavin, and M. K. Rosebrugh, for appellants.

W. D. Ward and J. O. Cravens, for appellee.

 Reno v. Robertson, Administrator.

RENO v. ROBERTSON, ADMINISTRATOR.

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137	110

JURISDICTION.— *Circuit Court.*— *Decedent's Estates.*— *Set-Off.*—The circuit court has no jurisdiction to entertain a suit to have a claim against an estate set off against a judgment in favor of such estate.

PRACTICE.—*Set-Off of Claim Against Estate Against Judgment.*—While such a claim is not reduced to judgment, the set-off cannot be obtained on mere motion, but a suit must be instituted for that purpose; and if the estate be insolvent, and the defendant in the judgment have no other method of obtaining satisfaction of his claim against the estate but by a set-off of the claim against the judgment, the court of common pleas may grant him relief.

APPEAL from the Jackson Circuit Court.

OSBORN, C. J.—The appellant filed his complaint in the Jackson Circuit Court, and alleged that the appellee as administrator of the estate of Frank Reno, deceased, recovered a judgment against him for five thousand dollars and costs, in the said court at the August term thereof, 1872, upon a demand that accrued to the decedent in his lifetime; that the judgment remained in full force, unreversed and unsatisfied; that the decedent, in his lifetime, on the 27th day of January, 1866, executed his note to his mother Julia A. Reno, for four thousand dollars, with interest from date; that Julia A. died on the 28th day of August, 1868, and by her last will and testament devised all of her personal property to the appellant, including the said note; that the note had duly and legally come to his possession and ownership by virtue of the will of said Julia A.; that he was such owner and holder at and before the death of the decedent; that there is now due and owing thereon the sum of five thousand six hundred and eighty dollars; that the estate of the decedent is wholly insolvent, and has no assets whatever except said judgment; that to compel the appellant to pay the judgment would leave him without remedy for the collection of the note, and be an irreparable injury and loss to him.

The prayer of the complaint is to set off so much of the amount of the note as will be equal to the amount of the

Reno v. Robertson, Administrator.

judgment; to declare the judgment satisfied, and that satisfaction be entered thereon, and for judgment for the surplus due him on the note, and for all proper relief.

Copies of the note and will were filed with and made a part of the complaint.

The appellee demurred to the complaint, for the reason that it did not contain facts sufficient to constitute a cause of action against him; and, second, that the court had no jurisdiction of the subject-matter in the complaint. The demurrer was sustained; the appellant excepted; final judgment was rendered against him; and he has assigned for error, first, that the court erred in sustaining the demurrer to the complaint; second, that the court should have overruled the demurrer to the complaint, instead of sustaining it.

The main object of the action was to set off the claim of the appellant against the judgment of the appellee, to have one claim satisfy the other.

In *Hill v. Brinkley*, 10 Ind. 102, it was held that the court would, on motion, set off judgments of the same court, and the judge delivering the opinion said that the court would thus set off judgments in different courts. In *Howk v. Meloy*, 26 Ind. 176, GREGORY, Judge, said the question whether the court would on motion set off judgments of different courts was not before the court in *Hill v. Brinkley, supra*. In *Brooks v. Harris, ante*, p. 390, it was held that a judgment rendered before a justice of the peace might be set off against one in the court of common pleas.

In *Keightley v. Walls*, 24 Ind. 205, it was held that without proof of the insolvency of the defendant, the plaintiff could not by an action for that purpose obtain satisfaction of his own outstanding indebtedness, by compelling a set off of a claim in his own favor, before both had passed into judgment; that where the demands were wholly disconnected, unless there were some special circumstances, such as insolvency or non-residence of the defendant, or other extraneous facts to form the basis of equity jurisdiction, such

Reno v. Robertson, Administrator.

relief would not be granted. In *Keightley v. Walls*, 27 Ind. 384, it was shown that Keightley held a judgment against Walls; that Walls was insolvent; that he had made a fraudulent assignment of a note owned and held by him against Keightley to one Eckels, who held it for the benefit of Walls; and it was held that the set-off should be allowed and thus satisfy both demands. "In compelling an equitable set-off, the court proceeds upon the ground that one demand is, *pro tanto*, a satisfaction of the other, and that the real indebtedness is merely the balance." The same doctrine is established in numerous cases, and applies to executors and administrators where cross demands exist between the estate and third parties.

In our opinion the complaint stated facts sufficient to constitute a cause of action, and if sustained by evidence, entitled the appellant to the relief prayed for.

We do not, however, think that the appellant could, on motion, have the judgment satisfied under section 377 of the code, on the facts stated in his complaint. It is only after the claims have passed into judgment that one can be used, on motion, to compel satisfaction of the other. *Keightley v. Walls*, 24 Ind. 205. Until judgment, that result can be accomplished only by an action instituted for that purpose.

Section four of the act to establish courts of common pleas, 2 G. & H. 20, conferred exclusive jurisdiction upon these courts of all actions against executors and administrators. This being an action to establish a claim against the estate, not yet in judgment, one in which pleadings might be filed and a jury trial had, and not a mere motion to enter satisfaction of a judgment by setting off one against another, we are of the opinion that the circuit court had no jurisdiction, and that the demurrer for the second cause was correctly sustained.

It was suggested in an oral argument by the appellant, that inasmuch as the appellee had his judgment in the circuit court, the complaint would be sustained for the pur-

Price v. Baker, Governor.

pose of an injunction to stay proceedings thereon, until judgment could be obtained on the note in the court of common pleas. But the complaint does not show that any steps had been taken to obtain such a judgment or any action other than this one upon the note. On the contrary, it appears from the complaint, we think, that this is the only action instituted, or step taken, to establish the claim of the appellant by the judgment or order of any court.

Of course, this will not prevent the appellant from prosecuting his action in the proper court.

The judgment of the said Jackson Circuit Court is affirmed, with costs.

W. K. Marshall, for appellant.

J. E. McDonald and *J. M. Butler*, for appellee.

PRICE v. BAKER, GOVERNOR.

SUPREME COURT.—*Assignment of Errors*.—When a party appeals to the Supreme Court by filing the transcript in the office of the clerk of said court, no appeal having been prayed in the court below, and no notice having been served, he may, without having assigned error, have his process or notice to the appellee issued by the clerk of the Supreme Court, and afterward assign errors, "on or before the first day of the term at which the cause stands for trial."

APPEAL from the Marion Circuit Court.

DOWNEY, J.—A question of practice having arisen in this case, it is thought best to state the point and the ruling upon it. The appellee moves to continue the cause, and the appellant moves that it be submitted. The transcript was filed in the office of the clerk of this court, no appeal having been prayed in the circuit court, or notice served, without any assignment of errors; and thereupon notice was issued by the clerk, which was duly served in time for the submission of the cause at this term. The appellee insists that no pro-

cess or notice could be issued by the clerk until after the errors had been assigned, while the appellant contends that the process or notice was properly issued, without the assignment of errors, and that the errors may be assigned at any time, on or before the first day of the term, as was done in this case.

Since the abolition of writs of error, all cases come to this court by appeal. There are three modes of appealing. The first is when the appeal is prayed and taken during the term of the court at which the judgment is rendered. The second is after the close of the term at which judgment is rendered, by the service of a notice in writing on the adverse party, or his attorney, and also on the clerk of the court in which the proceedings were had, stating the appeal from the judgment, or some specific part thereof. In neither of these modes of appealing is process or notice to the appellee from this court necessary, but the transcript must, of course, be filed in the office of the clerk of this court, as required by the statute and the rules of the court. The third, which is the mode resorted to in this case, is thus provided for by the last clause of section 556 of the code: "Or such appeals may be taken by procuring from the clerk of the court a transcript of the record, and proceeding in the suit, or so much thereof as is embraced in the appeal, and filing the same in the office of the clerk of the Supreme Court, who shall indorse thereon the time of filing, and issue a notice of the appeal to the appellee."

The section with reference to the assignment of errors is as follows: "Sec. 568. No pleadings shall be required in the Supreme Court upon an appeal but a specific assignment of all errors relied upon, to be entered on the transcript in matters of law only, which shall be assigned on or before the first day of the term at which the cause stands for trial; and the appellee shall file his answer thereto." It is clear enough, we think, from these provisions, taking them together, which we must do, for they relate to the same subject, that the party appealing in the manner resorted to in this case,

Price v. Baker, Governor.

may file his transcript, and, without assigning errors, if he choose to do so, take out his process or notice to the appellee, and assign his errors, "on or before the first day of the term at which the cause stands for trial." To assign the errors, however, before the process or notice to the appellee is issued, is the most common, convenient, and safe practice. Such was, probably, the practice contemplated by rule one of this court, which, by different numbers, has been in force since the organization of the court, and which is as follows: "The assignment of errors shall contain the full names of the parties, and process, when necessary, shall issue accordingly."

The rule is not, we think, clearly in conflict with the statute. It does not require that the assignment shall be made before the process issues. But if process has not been issued before the assignment of errors is made, but is then or thereafter issued, it shall issue according to the names in the assignment of errors. If the appellant take the risk of having his process issued before the errors have been assigned, and it shall not be issued in favor of or against the proper parties, he must take the chances of having it adjudged insufficient, or set aside.

The motion to continue the cause is overruled, and that to submit is sustained.

S. Claypool and W. R. Harrison, for appellant.

C. A. Ray and J. M. Davidson, for appellee.

PRICE v. BAKER, GOVERNOR.

ELECTION.—Ineligible Candidate.—Candidates for Different Offices.—Ballots Counted for the Office for which they are Cast.—Where a majority of the ballots at an election are given to a candidate who is not eligible to the office, the ballots so cast are not to be counted for any purpose. They cannot elect the ineligible candidate or defeat the election of the opposing candidate by showing that he did not receive the majority of the votes cast at such election.

It follows that the eligible candidate will receive the office, although less than a majority of the votes are cast for him. But this rule does not apply where two or more persons are candidates for different offices. Accordingly, although the office of one prison director is the same as that of another prison director, except it may be with reference to the time of election and the term for which he is to serve, still when one has been elected to succeed a designated person in such office, he cannot act as the successor of another in the same body, on the ground that the person who has been elected to succeed the other is ineligible.

APPEAL from the Marion Circuit Court.

DOWNEY, J.—This was a proceeding by mandate, instituted by the appellant against the appellee, as governor of the State, to compel him to issue to the appellant a commission as a director of the state prison at Jeffersonville. The governor made return to the writ, and the appellant demurred to the return, for the reason that it did not state facts sufficient to constitute a defense to the action. This demurrer was overruled, and the plaintiff excepted. A reply by general denial was filed by the plaintiff, and the cause was tried by the court; there was a finding for the defendant; a motion for a new trial, made by the plaintiff, for the reason that the evidence was not sufficient to sustain the finding of the court, was overruled, and final judgment was rendered for the defendant.

The errors assigned are in overruling the demurrer of the plaintiff to the return, and in refusing to grant him a new trial.

It is conceded by counsel for the appellant that, whether the case is to be decided upon the demurrer to the return, or upon the motion for a new trial, the question to be determined is the same. The facts of the case, so far as necessary to be stated for a correct understanding of the question involved, can be stated without reciting the pleadings at length. By the act of February 5th, 1857, 1 G. & H. 464, the board of directors of the prison consists of three members; and at the first election under the act, two of the number were to be elected for four years, and one for two years; and at the expiration of each full term, successors were to be

elected for a term of four years. The first election under the act was held in 1859. If a vacancy occurred before the expiration of any term, it was to be filled, and such incumbent would serve until the expiration of the term of the person whose vacancy he filled. *Baker v. Kirk*, 33 Ind. 517. At the session of the legislature in January, 1871, the board of directors consisted of Robert S. Heiskell, who had been elected by the legislature in April, 1869, at the special session; to complete the term of M. T. Ghee, who was elected in January, 1867; George C. Clark, who had been appointed in October, 1870, by the governor, to serve out the unexpired term of Fletcher M. Meredith, who was elected in January, 1867; and William W. Curry, who was elected in January, 1869, and who consequently had two years yet to serve.

It thus appears, and the fact is conceded by counsel for the appellant, that at the session of the legislature in 1871, there were two, and only two, directors to be elected. The facts as agreed upon, and used as evidence on the trial of the cause, state that at the session of 1871, as shown by the house journal, when the two houses were in joint convention, for the purpose of electing directors for the state prison south, and for other purposes, the lieutenant governor announced the next thing in order to be the election of directors of the southern state prison, and Senator Brown moved that the convention proceed first to the election of a director to fill the vacancy occasioned by the expiration of the term for which Mr. Meredith was elected in 1867, which was agreed to. Levi Sparks and George C. Clark were each put in nomination for that office. The roll was then called, and Sparks received seventy-eight votes and Clark seventy-one votes; and Levi Sparks having received a majority of the votes cast, the president of the senate declared him duly elected to the office of director of the southern state prison for the term of four years. Senator Brown then moved that the convention proceed to the election of director of the state prison to fill the vacancy occasioned by the expiration of the term for which Mr. Ghee was elected in 1867, and thereupon

Senator Green offered a protest and resolution, declaring that at the last regular session, 1869, W. W. Curry was duly elected for the term of four years, and at the special session afterward, Robert S. Heiskell was duly elected also a director; "therefore, be it resolved, that in the opinion of this convention, but one vacancy now exists to be filled at this time." This was not agreed to, but Senator Brown's motion was agreed to; and Mr. Simpson, of the convention, put in nomination for that office John Kirk; and there being no further nominations, the clerk proceeded to call the roll, and twenty-five senators and fifty members of the house, making in all seventy-five members of the convention, voted for said Kirk; and twenty-four senators and forty-seven members of the house, making in all seventy-one members of the convention, were present, but declined to vote. So Kirk, having received a majority of all the votes, the lieutenant governor declared him duly elected director of the southern prison, for the term of four years, in case a vacancy existed to be filled by the General Assembly.

The lieutenant governor then announced the next thing in order to be the election for the third director of the southern prison; whereupon Senator Hughes put in nomination Edward Price for that office, it being to succeed, as the journal recites, Mr. Heiskell, one of the present incumbents. There being no further nominations, the clerk proceeded to call the roll; twenty-five senators voted for Edward Price, and fifty-three members of the house, making in all seventy-eight votes; and twenty-four senators and forty-seven members of the house, making in all seventy-one, were present, and declined to vote. Mr. Price having received a majority of all the votes cast, the lieutenant governor declared him duly elected director for the southern state prison, in case a vacancy is found to exist. The senate journal of the proceedings of the joint convention shows the same facts, except that it shows that Price was put in nomination to fill the place then occupied by Mr. Curry. The principal secretary of the senate and the principal clerk of the house certified to the

Price v. Baker, Governor.

governor that Sparks was elected for four years, to fill the vacancy occasioned by the expiration of the term for which Mr. Meredith was elected in 1867; that Kirk was elected for the same term, to fill the vacancy occasioned by the expiration of the term for which Mr. Ghee was elected; and that said Price was elected for the term prescribed by law, without saying whom he was to succeed. The governor immediately commissioned Sparks, and he qualified, and discharged the duties of the office until he was superseded, as hereinafter stated. But the governor declined to commission Kirk, and did not do so until after the decision of this court in the case of *Baker v. Kirk*, 33 Ind. 517. After that decision, Kirk was commissioned, qualified, and entered upon the discharge of the duties of the office. The governor refused to commission Price, on the ground that there was no vacancy in the office to which he was elected.

In May, 1869, Sparks was elected mayor of the city of Jeffersonville, a city incorporated under the general law of the State, for two years, and was qualified, and took upon himself the discharge of the duties of that office. At the same time of the election of Sparks as mayor, a city judge was elected for the same term, in pursuance of a previous order of the common council for the election of such judge, and the said city judge was qualified, and took upon himself the duties of the office of city judge for said city. Sparks was acting as mayor at the time when he was elected director of the prison. Afterward, while Sparks was acting as director, under the commission so issued to him, he was again, in May, 1871, elected to the office of mayor of said city of Jeffersonville, accepted the office, qualified, and entered upon the discharge of his duties as such.

On the 22d day of May, 1871, the governor appointed and commissioned Robert S. Heiskell director of the prison, in place of Sparks, on the ground that Sparks had, by being or becoming mayor of said city, vacated the office of director. Heiskell qualified, and entered upon the discharge of his duties as director. See the case of *Howard v. Shoemaker*,

35 Ind. 111, where it was held by this court that Sparks had vacated his office of director, and that Heiskell was therefore properly appointed by the governor.

It is conceded by counsel for the appellant that there were but two vacancies to be filled in the board of prison directors, at the session of the legislature in 1871, and these were in the directorships to which Meredith and Ghee had been elected in 1867. But it is claimed that Sparks was ineligible to the office of director, because, at the time of his election, he was mayor of Jeffersonville; that the office of mayor is a judicial office, and that Sparks was therefore ineligible, under section 16, article 7, of the constitution of the State, to the office of director, or any other than a judicial office, during the term for which he had been elected; and that therefore Price should have been commissioned, and should have had the office of director, instead of Sparks.

The question whether the office of mayor, where there is a city judge, is a judicial office or not, was presented to this court in the case of *Howard v. Shoemaker, supra*, and, as it was not necessary to the determination of that case that it should be decided, and as the judges were not all of one opinion with reference to it, the case was disposed of upon other grounds. In the case under consideration, it seems to us unnecessary to decide the question, for the reason that we have come to a conclusion unfavorable to the appellant, on another vital point in the case.

It is a principle of law well settled in this State, that where a majority of the ballots at an election are given to a candidate who is not eligible to the office, the ballots so cast are not to be counted for any purpose. They cannot be counted to elect the ineligible candidate, or to defeat the election of an opposing candidate by showing that he did not receive a majority of the votes cast at such election. They are regarded as illegal, and as having no effect upon the election for any purpose. As a consequence, it follows that the candidate who is eligible, having the highest number of legal

Price v. Baker, Governor.

votes, though that number may be less than the number of votes cast for the ineligible candidate, and less than a majority of all the votes cast at such election, is entitled to the office. *Gulick v. New*, 14 Ind. 93. But this rule is applicable to those cases only where different persons are candidates for the same office, and it has no application to cases where two or more persons are candidates at the same election for different offices. To apply the rule in such a case would be to put a party into an office for whom, as a candidate for that office, none of the electors had voted. It is true that the office of one prison director is the same as that of the others, except it may be with reference to the time of election and the term for which he is to serve. But we think it must be held that when one has been elected to succeed a designated person, he cannot act as the successor of another in the same body, on the ground that another who has been elected to succeed such other person was ineligible to the office.

There is some uncertainty, as it appears, in the journals of the two houses, as to the person whom Price was intended to succeed. The house journal states that he was to succeed Heiskell, while the senate journal says he was to succeed Curry. The convention had already elected Kirk to the directorship which was held by Heiskell, who, as we have seen, was filling out the term for which Ghee had been elected in 1867. It is clear, however, that Price was not elected to the directorship which had been held by Meredith, and by Clark, who was filling out his term by appointment of the governor. Should we hold, then, that Price could have the directorship to which Sparks was elected, on account of his being ineligible, we should put him in an office for which he received no votes. It seems to us that there are substantial reasons, in addition, why this cannot be done. In making up a board of prison directors, it may well be supposed that the legislature would, in the choice of the members, select them with regard to their residence, age, experience, and their peculiar talents or fitness for the place, so as to combine in the board all the elements and characteristics best calcu-

lated to take care of the interests of the State and of the convicts. Curry, Sparks, and Kirk might combine all the essential elements of a good board, while Curry, Kirk, and Price, with equal or superior talents, in the aggregate, might not constitute such a board as the legislature would have elected.

In *The King v. Smith*, 2 M. & S. 406, the facts were that the borough of Wotton Bassett consisted of a mayor, two aldermen, and twelve capital burgesses out of whom the mayor and aldermen were chosen, and the capital burgesses were chosen by the mayor, aldermen, and capital burgesses. At a corporate meeting, one Starkey made a pretended resignation of the office of capital burgess, and Smith was elected in his place, and sworn in. Starkey, at the time of his resignation, was an alderman, having been elected and sworn in as such at a former meeting, and had thereby vacated his office of capital burgess; and the number of capital burgesses was complete at the time of the meeting at which Starkey resigned, and Smith was elected in his place. In a *quo warranto* against Smith, for exercising the office of capital burgess, he showed for cause that, at the same meeting, Kibblewhite, then a capital burgess, was elected and sworn in an alderman, and thereby vacated his office of capital burgess, and while such vacancy continued, the defendant, Smith, was elected, and sworn in a capital burgess; but it was not shown that he was elected to fill up such vacancy, nor was it denied that he was elected to fill the vacancy supposed to be made by the pretended resignation of Starkey. His counsel contended that, there being an actual vacancy at the time of the defendant's election and swearing in, his title should be referred to that vacancy which did exist, so as to make him a burgess *de jure*, as well as *de facto*, although he was chosen upon a supposed vacancy which did not exist. The court said that it was clear they elected Smith to fill up the supposed vacancy of Starkey, and no other, and, that being so, his election could not be referred to the vacancy of Kibblewhite; for it might have made a very material difference in

Tilford, Auditor, *v.* Douglass, Trustee.

the choice of the electors, if they had known that they were supplying any other vacancy than the supposed vacancy of Starkey. The same person who, in their judgment, might be fit to succeed him, might not have been selected in place of the other. It might be thought material to preserve a proportion between corporators of different descriptions or influence in the corporate body, which would make a consideration of the vacancy very important in the choice of a successor.

The reasoning in this case is quite applicable to the case under consideration. We are of the opinion that there was no error committed by the circuit court in its rulings in the case.

The judgment is affirmed, with costs.

S. Claypool and W. R. Harrison, for appellant.

C. A. Ray and J. M. Davidson, for appellee.

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TILFORD, AUDITOR, *v.* DOUGLASS, TRUSTEE.

TOWNSHIP TAX.—*Incorporated Town.*—A tax for township purposes can be legally collected upon property within an incorporated town situated in the township where the tax has been levied.

APPEAL from the Morgan Circuit Court.

DOWNNEY, J.—This was a proceeding by mandate, by the appellee, as township trustee, against the appellant, as auditor of the county. A demurrer to the affidavit or complaint was overruled, the defendant excepted, and failing to make any further defence, judgment was rendered against him. The error assigned is the overruling of the demurrer; and the question, and only question, involved in the case is whether or not a tax for township purposes can be legally collected upon property within an incorporated town situated in the township where the tax has been levied.

Tilford, Auditor, *v.* Douglass, Trustee.

It is contended by counsel for the appellant that no part of the fund arising from this tax is expended for the benefit of the incorporated town, and that therefore the property of the town should pay no part of the tax.

By the act relating to township business, 1 G. & H. 636, most of the duties of a township trustee are prescribed. He must keep a record of his proceedings; receive and disburse the money of the township; divide the township into highway districts; fill vacancies in the office of supervisor of highways; see to the application of all moneys belonging to the township for school, road, or other purposes, and perform all duties theretofore required of township trustees, clerk, and treasurer, under the supervisors and school acts; manage all property, real and personal, of the township; cause a record to be made and kept of the road districts, and any alterations in the boundaries of them; and administer oaths when necessary in the discharge of the duties of his office. He is also to act as inspector of elections, overseer of the poor, and fence viewer. He is to levy the township and road tax, with the advice and concurrence of the board of county commissioners, and report the same to the county auditor, that it may be put on the tax duplicate and collected by the county treasurer. He is to examine and settle accounts against the township, take vouchers, keep accounts, and report them to the county commissioners in his annual report. He is to settle with the supervisors, and to make a detailed report to the county board, annually, at which time the commissioners, upon the filing of an itemized statement, verified by him, of his charges and services as trustee, are authorized to allow him such reasonable compensation as they deem just, which by that act was not to exceed one dollar and fifty cents per day; but by the fee law of 1871, was increased to two dollars and fifty cents per day, and by the fee law of 1873, to three dollars per day, and which compensation, by all of said acts, was and is payable out of the township fund.

The township trustee performs no duties with reference

Tilford, Auditor, *v.* Douglass, Trustee.

to the common schools in the incorporated towns. These duties in the towns are performed by officers appointed by the authority of the town. 3 Ind. Stat. 441, sec. 4, and p. 442, sec. 5. He has little to do with reference to streets, alleys, and highways in the the incorporated towns, or the road tax thereon, although, perhaps, it cannot be said that he has nothing to do with them. He levies the road tax as we have seen, and this is probably collectible within the towns. 1 G. & H. 629, sec. 47, and Acts of 1869, p. 33, sections 1 and 9.

It is also claimed that the expenses of the poor are all paid out of the county treasury, and not out of the township fund. This seems true as to the disbursements for the relief and support of the poor, but not, we think, as to the pay of the trustee for his services as overseer of the poor. To act as overseer of the poor is, as we have seen, one of his duties as trustee, and for all his services as trustee, as we have shown, he is paid out of the township fund.

We have not been referred to any statute which makes any other provision for payment for his services as inspector of elections, unless it be that found in 1 G. & H. 314, secs. 48 and 49; and it is questionable whether these sections, so far as the compensation of the trustee is concerned, are not superseded by the late statutes to which we have referred, making general provision for paying him for all his services out of the township fund. As the poor are generally more numerous in the towns than in the country, it is probable that the towns get their full share of the services rendered by the trustee as overseer of the poor.

The people of an incorporated town should not pay any part of the compensation of the trustee while he is acting with reference to public schools or other matters which concern exclusively the part of the township outside of the incorporated towns; but it seems right that the towns should pay their proper proportion of the compensation of the trustee when he is engaged as overseer of the poor, or in other matters which concern the town as well as the rest of

Hays *et al.* v. Vickery.

the township. There is an evident inequality in collecting from the town, equally with the rest of the township, a tax, a great part of which is expended for purposes in which the town has no concern. But while the law remains as it is, there is no remedy which the courts can apply.

The judgment is affirmed, with costs.

C. F. McNutt and *G. W. Grubbs*, for appellant.

W. R. Harrison and *W. S. Shirley*, for appellee.

HAYS ET AL. v. VICKERY.

WILL.—*Executor Named Acting by Consent Without Qualifying.*—Where a will has been duly probated, and one of the heirs, legatees, or devisees under the will named therein as executor, has by mutual consent and understanding of all the persons interested in the estate as such heirs, legatees, or devisees, acted as such executor and proceeded to make distribution of the personal property, without qualifying as executor, the husbands of a part of the heirs cannot, without notice to the person so acting as executor, on application to the clerk, have a stranger appointed as administrator with the will annexed, after the time for the person named as executor in the will to qualify has expired. The heirs having consented that the person named as executor should act without qualifying, it would be a fraud on him and the other heirs, legatees, and devisees to assert that he had waived his right by not qualifying within the time limited by statute.

APPEAL from the Hendricks Common Pleas.

OSBORN, C. J.—The appellants are legatees and devisees under the will of John Hays, deceased, and the appellee is the administrator, with the will annexed, of the estate of said Hays.

The record and finding of the court show the following state of facts:

On the 2d day of February, 1870, Hays executed his last will and testament. On the 6th day of March, 1871, he died testate. On the 11th of the last named month, the

Hays et al. v. Vickery.

will was admitted to probate by the clerk of the Hendricks Court of Common Pleas. All of the appellants are heirs, devisees, and legatees of the testator. Catharine is his widow, and John H. was named in the will as executor. After the probate of the will, there was a common understanding among the parties interested in the estate, the heirs, devisees, and legatees, that the estate should be settled among themselves without letters testamentary or of administration; and with that understanding, John, who was named in the will as executor, undertook to settle the estate without letters, sold personal property, and made distribution among the legatees, with the knowledge of all, and without objection from any of them.

Afterward, two of the married daughters of the testator, becoming dissatisfied with the manner in which the business was conducted, without consultation with the other legatees, and without notice to John, or either of the other devisees or legatees, of any dissatisfaction or objection to the settlement of the estate by John without letters testamentary, on the petition of their husbands, procured the clerk of the Hendricks Common Pleas, in vacation, to issue letters of administration, with the will annexed, to the appellee, without the knowledge or assent of the appellants, or either of them, or any of the other devisees, legatees, or heirs. Vickery, the appellee, is neither a creditor nor legatee under the will. Neither of the appellants relinquished, waived, or abandoned any right to administer upon the estate, otherwise than by failing to qualify by the common understanding and consent of all parties interested. And as between the parties to the agreement, John H. will not be deemed to have waived his rights to administration.

On the first day of the first court, after the issuing of letters to the appellee, the appellants appeared and objected to the confirmation, and asked that letters testamentary should issue to John H. The objections and requests were overruled, and the court confirmed the letters of administration issued to the appellee and his appointment as administrator.

The appellee claims that inasmuch as none of the parties entitled to letters applied for them within the time limited by the statute, they abandoned and forfeited the right to them, as against any one to whom the clerk of the court should thereafter issue letters, and all right to object to the confirmation of such letters and appointment, except for incompetency or an insufficient bond. In support of that position, he refers us to *Mills v. Carter*, 8 Blackf. 203. In that case, Carter took out letters of administration within thirty days after the death of the intestate. At the next term of the court, Mrs. Mills, who was the widow of the decedent, objected to the confirmation of the letters issued by the clerk in vacation, and gave as a reason for not applying for letters within the thirty days, that she supposed she was bound by the previous grant to Carter. It was held that her objection ought to have been sustained, and that she had not, by her delay, abandoned or lost her right to administration.

We are also referred to *Brown v. King*, 2 Ind. 520. The court in that case held that if no valid objection appears to the grant of letters by the clerk, the same shall be ratified.

John H. Hays, the person named in the will as executor, by the agreement of all the heirs, devisees, and legatees, had acted as executor without taking out letters testamentary; and whilst he was thus acting, the appellee, on the petition of the husbands of the two daughters of the testator, procured himself to be appointed administrator, without the knowledge or consent of the executor or any other devisee or legatee. At the first moment that it could be done, John H. appeared and objected to the confirmation of the letters to the appellee, and asked that letters testamentary should be granted and issued to him. The other devisees and legatees united with him in such objection and request.

The objections ought to have been sustained, and the petition, or request, for the appointment of John H. Hays granted. The delay in taking out letters and failure to qualify as executor was by mutual arrangement, and was not, under the circumstances, an abandonment or waiver of

the rights of John H., and did not entitle the appellee to take out the letters granted to him. In procuring them, an undue advantage was taken of the executor and the appellants.

If the daughters, or their husbands, were not satisfied with the understanding that the executor should act as such without taking out letters, good faith required that they should give notice of it before proceeding to procure letters of administration to some one else. Having acquiesced in his acting without qualifying as executor, and having induced him to delay taking out letters until after the time fixed by law, it was a fraud upon him and the appellants to undertake to deprive him of his rights without notice.

The judgment of the said Hendricks Common Pleas is reversed, with costs against the appellee; cause remanded, with instructions to sustain the objection filed by the appellants, and to grant letters testamentary to the said John H. Hays, upon his filing a proper bond, etc.

W. A. McKenzie, J. V. Hadley, and J. S. Ogden, for appellants.

L. M. Campbell, for appellee.

LAW ET AL. v. LONG ET UX.

CONVEYANCE.—*Married Woman.*—*Minor.*—*Statute Construed.*—Under section 41 of chapter 28 of Revised Statutes 1843, p. 421, a married woman under the age of eighteen years could not, either with or without the consent of her father or guardian, release or relinquish her dower in the lands of her husband by him sold and conveyed.

SAME.—*Deed of Minor Voidable and Not Void.*—The deed of a minor, conveying his land for a valuable consideration is voidable, and not void, and the right to avoid it on coming of age is a personal privilege to the minor and his heirs.

SAME.—*Married Woman.*—*Right of Dower.*—The joinder of a married woman,

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who is also a minor, in the execution of a deed conveying the lands of her husband, not being void but voidable merely, operates to relinquish her right of dower, subject to her right of election, on arriving at full age, either to affirm or disaffirm her deed.

SAME.—*Disaffirmance of Deed.*—Where the act of an infant is executed, as where a deed is made and delivered, the infant must, on attaining full age, do some act to disaffirm the contract.

SAME.—*Disaffirmance of Deed.*—*Action for Assignment of Dower.*—Where an infant *feme covert* has joined in a deed with her husband, conveying his real estate, she cannot maintain an action to obtain an assignment of dower in the real estate so conveyed, unless her deed has been disaffirmed in some mode known to the law, before the commencement of the action.

DOWER.—*Proceeding for Assignment of Dower.*—*Demand.*—A proceeding for the assignment of dower under the Revised Statutes of 1843 cannot be maintained, unless it is alleged and proved that there has been a demand made for the dower before the commencement of the action.

INFANT.—*Married Woman.*—*Action to Avoid Deed.*—*Tender.*—An action may be brought to avoid a deed made by an infant *feme covert*, without paying or tendering back the purchase-money for the premises in dispute.

DOWER.—*Action for Assignment of.*—*Purchaser.*—The plea of *bona fide* purchaser for value is no defence, even in a court of equity, against a legal claim for dower.

APPEAL from the Shelby Circuit Court.

BUSKIRK, J.—This was an action by the appellees, as husband and wife, against the appellants, to obtain an assignment of dower to the female plaintiff, in certain described real estate.

The complaint was in two paragraphs. The substantial averments in the first paragraph were as follows:

“That on the 6th day of January, 1848, the plaintiff Nancy was married to Abraham Hill; that her said husband wrongfully obtained the possession of her money and property, and without her consent invested the same in the purchase of the real estate in controversy; that by mistake and without her consent, the deed was made to Abraham Hill, when it was agreed between her and her husband that the land should be conveyed to her; that on the 5th day of September, 1851, she and her said husband, for a valuable consideration, conveyed said land to the defendant Joel Law; that at the time of said conveyance she was a minor, and was not of age until the 11th day of December, 1854, being at such

time under eighteen years of age; that she made said deed under duress and compulsion of her said husband; that Law, at the time of making said deed, knew that she was an infant, under eighteen years of age, that she was the owner of said real estate, and that she acted under duress and compulsion; that in 1867, Law conveyed to the defendant Scott twenty acres, and to defendant Kendall sixty acres, of said land; that said Scott and Kendall purchased with full notice of her rights and the facts hereinbefore stated; that Abraham Hill, her husband, died in Shelby county, Indiana, in October, 1852; that on the 30th day of August, 1853, she was married to Nicholas Wheeler; that Wheeler died in April, 1864; that in September, 1868, she was married to her co-plaintiff, George W. Long. The prayer was, that such deeds should be set aside and held for naught; that her title to the said premises be quieted and for general relief."

The second paragraph was the same as the first, except there is no averment that said real estate was purchased with her separate means, and except there was an averment that on the 11th day of December, 1854, she demanded her dower of Law, who refused.

The prayer of this paragraph of the complaint was, that dower should be assigned to her, and for judgment for two thousand dollars, and for general relief.

The defendants demurred separately to each paragraph of the complaint. The demurrers were overruled, and they excepted.

The defendant Law answered as follows:

First. General denial.

Second. That she was over eighteen years old when she made the deed.

For third paragraph says, that immediately after making said deeds, Abraham Hill and Nancy left and went to Iowa, and there purchased land with the money Law paid for said land sued for, and, with her consent, took the title in his own name; that Abraham Hill died in Shelby county, Indiana, in October, 1852, seized of the land purchased in Iowa,

leaving Nancy Long, his widow, and three children, him surviving; that in 1861, and after she arrived at twenty-one years of age, she sold the Iowa lands for five hundred dollars, and applied it to her own use; wherefore, the Longs are estopped to claim dower.

For fourth paragraph of answer, Law alleged that when the deed was made to him, Abraham Hill and Nancy were living on the land, and he died in Shelby county, in October, 1852, in the vicinity of the land; that she continued to reside in the vicinity of the land until after she arrived at twenty-one years of age, in the year 1854, when she married Wheeler, and they removed to Iowa, and returned to Shelby county, in 1862, and rented said land from said Law, and resided thereon, and in the immediate vicinity of said land, until Wheeler died, in the year 1864, within one mile of said land; that Nancy continued to reside in the vicinity of said land, sole and unmarried, until September, 1868, when she married Long; that during all this time Nancy saw and knew that Law had been making valuable improvements on the land, well knew that he was ignorant that she was under eighteen years of age when she made the deed, and believed she was over eighteen years old, and that her guardian declared publicly, in her hearing, and in the hearing of others, that she was over the age of eighteen years; that she then and hitherto concealed the fact from Law that she was under eighteen years, and made no claim or demand whatsoever of this defendant for dower in said land, or other right, but suffered this defendant for nineteen years in ignorance to occupy and improve said land, and knew of said Law's selling and conveying said lands to his co-defendants, without her claiming her rights to said land.

The defendants Scott and Kendall answered jointly as follows:

First. General denial.

Second. That Nancy was over eighteen years of age when she joined in the deed.

For third paragraph of answer, they say, that Abraham Hill and Nancy invested said money obtained from Law in the purchase of land in Iowa, and she consented that he might take the title in his own name; that Abraham Hill died in October, 1852, seized of said Iowa land, leaving Nancy and two children him surviving; that Nancy, after arriving at the age of twenty-one years, sold the Iowa land for five hundred dollars, and applied it to her own use; wherefore she is estopped, etc.

For fourth paragraph, that Nancy concealed from Law her disability, and represented to Law that she was over eighteen years of age, and that Law believed she was over eighteen years of age; that she knew Law was about to sell said land to the said Scott and Kendall, and concealed from them the fact that she was under eighteen years of age when she made the deed, and never gave them any notice of, or claimed from them any interest in said land, although all the time she had been residing in the vicinity of said land; that Nancy was unmarried from the month of October, 1852, until the year 1853, and from 1864 until September, 1868, and competent to assert her rights. She made no claim to said lands, and acquiesced in said sales; that these defendants purchased and paid for and received deeds from Law for said land, before they, or either of them, had any notice of her pretended claim; that Law was in possession of said lands from the time the Hills deeded the land to him, and was in possession when they purchased from Law; that they purchased in good faith, etc., Scott the twenty acres, and Kendall the sixty acres; that Nancy was present when Scott got his deed, and she could and failed to make any claim against said land, and represented to him that she was over eighteen years old when the deed was made to Law; that Law conveyed to Kendall for three thousand five hundred dollars then paid; that Abraham Hill and Nancy invested the money paid them by Law in Iowa land, and she, after Abraham Hill's death, sold her interest therein for five hundred dollars, and applied the money to her own use.

The fifth paragraph of answer sets up the declaration of the guardian set out upon the deed of Law, that she was over eighteen years old, as an estoppel.

The plaintiff replied in denial of the second paragraph of the answer of Law, and demurred to the third and fourth paragraphs. The demurrer to the third paragraph was sustained, and an exception taken, and was overruled as to the fourth.

The plaintiff replied in denial of the second paragraph of the joint answer of Scott and Kendall, and demurred to the third, fourth, and fifth paragraphs. The demurrer to the third and fifth paragraphs was sustained, and an exception taken, and was overruled, as to the fourth.

There was a reply in denial to each of the fourth paragraphs.

Law, Scott, and Kendall each filed answer, setting up the statute of limitations as to the recovery of damages, which were replied to by a denial.

The cause was tried by the court, and resulted in a finding that the plaintiff Nancy was entitled to dower in said premises.

Separate motions for a new trial were made by each of the defendants, which were overruled. A decree for dower was rendered. Commissioners were appointed, who assigned dower and submitted their report, which was, in all things, confirmed.

The appellants have assigned the following errors:

1st. In overruling the demurrer to the second paragraph of complaint.

2d. In sustaining the demurrer to the third paragraph of answer of Law.

3d. In sustaining the demurrer to the third and fifth paragraphs of the joint answer of Scott and Kendall.

4th. In overruling the three separate motions for a new trial.

5th. In confirming the report of the commissioners, and in rendering judgment thereon.

There are other assignments of error, but they are all included in the fourth.

The above assignments of error present several questions of importance and difficulty. We do not propose to consider the errors in the order of their assignment, or to notice all the questions that have been discussed with so much ability by counsel. We prefer to make a brief summary of the facts of the case, and then consider a few questions, which, in our judgment, will be decisive of the case.

There was no proof to sustain the averments in the first paragraph of the complaint, and no error has been assigned on the overruling of the demurrer thereto. We shall take no further notice of the first paragraph.

The only question presented by the record is, whether the appellee Nancy is entitled to dower in the premises in dispute, her husband having died before the statute which abolished dower and substituted an estate in fee simple went into force. Abraham Hill was seized of the lands in dispute, and on the 5th day of September, 1851, he and his wife, Nancy, for a valuable consideration, conveyed them to the appellant Law. Mrs. Hill was then a minor, under the age of twenty-one, but she and her guardian represented that she was over eighteen years of age, and her guardian appeared before the officer, who took the acknowledgment and stated that the said Nancy was over eighteen years of age, and gave his consent to the sale and conveyance of said land. Soon after such conveyance, Hill and wife moved to the State of Iowa, where he invested the money which he received for the sale of the lands in dispute in the purchase of other lands. In 1852, Hill and wife returned to Shelby county, in this State, where he died in October of that year. The lands purchased in Iowa were sold after his death, and his widow received five hundred dollars as her share of the proceeds thereof. Mrs. Hill lived in a few miles of the land in dispute until the 30th of August, 1853, when she was married to Nicholas Wheeler. Soon after such marriage, Wheeler and wife moved to Iowa and remained about

a year, when they returned to Shelby county, Indiana, and lived for about two years in a house on the land in dispute, during which time Wheeler was frequently employed by Law to work on the farm. Wheeler died in April, 1864. His widow resided in the neighborhood of said lands until in September, 1868, when she was married to her co-plaintiff, George W. Long. Long and his wife resided near to said lands until the commencement of this suit. In September, 1851, Law conveyed, for a valuable consideration, twenty acres of said land to the appellant Scott, and in November, 1869, Law conveyed sixty acres of said land to Mrs. Kendall for a valuable consideration. Neither Scott nor Mrs. Kendall knew, at the time of said purchases and conveyances, that the said Nancy was not over eighteen years of age at the time she and her husband conveyed said lands to Law, or that she claimed to have any interest in said lands. The said Nancy did not, prior to the commencement of this suit, in any manner disaffirm her deed, or give notice of any intention to do so, or that she claimed any interest in said lands; nor did she demand her dower, or pay or tender the purchase-money received by her said husband for said lands. Nor did she, by any affirmative act, ratify and affirm her said deed of conveyance. This suit was commenced on the 25th day of March, 1870, and is the only act done by the said Nancy which evinces an intention on her part to disaffirm her deed, and to claim dower in said lands.

The question is presented whether, upon the above facts, the appellee Nancy is entitled to dower in the lands of which her husband, Hill, was seized during their marriage, and which were sold to Law. We will, in the first place, consider the question, as between her and Law, as to that portion of the lands which he owned at the commencement of the action; and in the second place, we will consider and decide whether the fact that Scott and Mrs. Kendall were purchasers for a valuable consideration, and without notice, will defeat and bar her right to dower.

Law et al. v. Long et ux.

The appellee Nancy claims that she is entitled to dower in the lands in dispute, because at the time she and her husband conveyed said lands to Law, she was a minor, under the age of eighteen years, and that consequently she possessed no legal capacity to join with her husband in the conveyance of such lands.

By the law which was in force at the time the deed was made, a married woman who was under the age of eighteen years possessed no legal capacity to join with her husband in the conveyance of his lands and the relinquishment of her dower therein. R. S. 1843, 421, sec. 41, chap. 28.

It is provided by said section 41, that "any married woman over the age of eighteen years, and under the age of twenty-one years, may release and relinquish her right to dower in any lands of her husband, sold and conveyed by him, by executing, and acknowledging the execution of such conveyance, as provided in the last preceding section, if the father or guardian of such married woman, shall declare, before the officer taking such acknowledgment, that he believes that such release and relinquishment of dower is for the benefit of such married woman, and that it would be prejudicial to her and her husband to be prevented from disposing of the lands thus conveyed; which declaration, with the name of such father or guardian, shall be inserted as a part of the certificate of the officer taking such acknowledgment."

Under the above section, a married woman, under the age of eighteen years, could not, either with or without the consent of her father or guardian, release or relinquish her dower in the lands of her husband, by him sold and conveyed. The father or guardian had no power to give his consent, unless she was over eighteen and under twenty-one years of age. So, if, in point of fact, the appellee Nancy was under eighteen years of age, at the time the deed in question was made, the declaration and consent of her guardian could give no force or validity to the deed. The case, therefore, stands as a conveyance of a married woman under eighteen years of age.

If the deed was void, as to Nancy, by reason of her infancy, she did not relinquish her right to dower, and she could not ratify and affirm such deed upon arriving at full age, except by the execution of a new deed. The doctrine is well settled, that an act which is absolutely void is incapable of ratification by an act *in pais*. *Fetrow v. Wiseman*, 40 Ind. 148.

If, on the other hand, the deed, as to Nancy, was voidable, then she had the election, upon arriving at full age, either to affirm or disaffirm the deed, and such affirmation or disaffirmance might be affected by acts *in pais*.

There has been and still is much conflict, in the adjudged cases, and among elementary writers, as to whether the acts of an infant are absolutely void, or voidable merely. We were required, in the recent case of *Fetrow v. Wiseman*, *supra*, to review the authorities upon this question, and we arrived at the conclusion that the very decided weight of modern authorities was, to hold them voidable only, and not void. The examination of the authorities in the present case has very strongly confirmed our minds as to the correctness of the ruling in that case. The rule is well established, by decided cases, that the deed of a minor, conveying his land for a valuable consideration, is voidable, and not void, and that the right to avoid it, on coming of age, is a personal privilege to the minor and his heirs. We refer to the following authorities, in addition to those cited in the above case: *Kendall v. Lawrence*, 22 Pick. 540; *Oliver v. Houdlet*, 13 Mass. 237; *Worcester v. Eaton*, 13 Mass. 371; *Whitney v. Dutch*, 14 Mass. 457; *The Boston Bank v. Chamberlin*, 15 Mass. 220; *Nightingale v. Withington*, 15 Mass. 272.

There is no question made as to the validity of the deed of Hill. It passed and vested the title in fee in the grantee, subject to the inchoate right of dower in his wife. Her joinder in the deed not being void, but voidable merely, operated to relinquish her right of dower, subject to her right of election on arriving at full age, either to affirm or disaffirm her deed. There is a well defined distinction between the acts to be done by the infant on arriving at age,

Law et al. v. Long et ux.

where the contract is executory, and where it is executed. Where the contract is executory, such as a promise to pay money, the infant must, to render him liable thereon, on arriving at full age, expressly ratify it, and expressly promise to pay it. Where the act is executed, as where a deed has been made, the infant must, on attaining full age, do some act to disaffirm the contract. In other words, where the contract is executory, there must be an affirmance to render the contract valid, and where it is executed, there must be a disaffirmance to avoid the operation of the deed. There seems to be a difference between contracts simply for payment of money or the performance of any personal duty, and those which are connected with land, or grow out of an interest therein. *Barnaby v. Barnaby*, 1 Pick. 221.

It is strenuously insisted by counsel for appellees, that the appellee Nancy was not required, on arriving at full age, to do any act to disaffirm her deed; that her mere silence and acquiescence cannot be construed into a confirmation of the contract; that the bringing of the suit disaffirmed the contract; and that the said Nancy, having been a married woman, was not bound to bring the action during her coverture; and in support of these positions, reference is made to the following adjudged cases: *Drake v. Ramsay*, 5 Ohio, 252; *Jackson v. Carpenter*, 11 Johns. 539; *Jackson v. Burchin*, 14 Johns. 124; *Rogers v. Hurd*, 4 Day, 57; *Miles v. Linger-man*, 24 Ind. 385.

The court, in *Drake v. Ramsay*, *supra*, say: "But to us it appears, that the word voidable, *ex vi termini*, shows that such a deed transmits the title; and that after vesting, it continues in the grantee, until divested by some act of the maker of the deed. Some of the books apparently suppose, that the act of avoidance must be of equal solemnity with the act of grant. *Rogers v. Hurd*, 4 Day, 57; *Jackson v. Burchin*, 14 Johns. 124. But I cannot find it to be expressly decided, except in case of feoffments, where a peculiar feudal principle renders it necessary. We believe that an entry, suit or action, a subsequent conveyance, an effort to restore parties

to their original condition, or any act unequivocally manifesting the intention, would render the avoidance effectual, and that the institution of this suit is an act fully possessing this character."

The above case is expressly overruled, so far as it holds that a voidable deed of an infant can be avoided by a subsequent deed to a third person, after the infant arrives at age, in *Cresinger v. Lessee of Welch*, 15 Ohio, 156, and the residue of the opinion is so limited, modified, and explained, that but little of it is left, and it cannot be regarded as very high authority.

The cases of *Jackson v. Carpenter* and *Jackson v. Burchin* were reviewed and virtually overruled in the subsequent case of *Bool v. Mix*, 17 Wend. 119. The court held that the deed of a minor could not be avoided by another deed to a third person, and that the proper way to avoid such a deed was by an entry.

Judge BRONSON, speaking for the court, said:

"It is unnecessary, on the present occasion, to say that an entry on the land was the only mode in which the deed could be avoided, for the plaintiff, previous to bringing the action, had done no act whatever to disaffirm the conveyance. She had not even demanded possession of the land, or given notice to the tenant that she did not intend to be bound by the deed.

"If one who has aliened his estate while an infant wishes afterwards to avoid the conveyance, it is imposing no unreasonable burden to require that it shall be done by an entry on the land, or by some other act of equal notoriety; and the avoidance, whatever may be its form, must precede the bringing of an action to recover possession. Justice to the tenant requires it; and there is no other way in which we can carry out the doctrine that the deed of an infant is voidable only, and not void. Although the title of the tenant may be defeated, yet, so long as the deed remains unrevoked, he has the legal seizin of the land, and cannot be sued as a trespasser. It is little better than a contradiction in terms, to say that a man who has the rightful possession of lands

Law et al. v. Long et ux.

can be treated as a wrong-doer. In the case under consideration, the deed remained in full force at the time the action was brought; the possession of the defendant was not tortious, and the action of ejectment cannot be maintained."

We regard the case of *Rogers v. Hurd, supra*, as being against the position assumed by counsel for appellees. The court say: "Questions will arise, whether the infant has an act to perform, to avoid or confirm his contract, and what acts shall amount to an avoidance or confirmation. Indeed, the same evidence ought to be required of the confirmation of a voidable contract, after full age, as of the execution of a new one, to avoid fraud and imposition."

The court was considering whether there had been a confirmation of the contract, and, consequently, did not speak of the evidence required to disaffirm a contract.

The case of *Miles v. Lingerman, supra*, does not, upon the point under examination, support the views of counsel for appellees. It is said in the opinion, that "evidence was also introduced, on the trial, that the plaintiff had given notice to the defendant of her intention to avoid the deed."

Again it is said: "But when, having by her own act avoided the deed, she comes into a court of law, demanding possession of property to which she holds a perfect title, no equitable conditions can be imposed upon her by the court."

We are not informed by what acts she had avoided the deed, but it is expressly stated that she had avoided the deed before the bringing of the action.

We have examined the following authorities, and find that they substantially support the principles laid down in the case of *Bool v. Mix, supra*:

2 Kent, 236; 2 Washb. Real Prop. 559; *Kline v. Beebe*, 6 Conn. 494; *Cloud v. Webb*, 3 Dev. 317; *Prewit v. Graves*, 5 J. J. Mar. 114; *Phillips v. Green*, 3 A. K. Mar. 7; *Oldham v. Sale*, 1 B. Mon. 76; *Priest v. Cummings*, 16 Wend. 617; *Adams v. Palmer*, 51 Maine, 480; *Eubanks v. Peak*, 2 Bailey, 497; *Deason v. Boyd*, 1 Dana, 46; *Robbins v. Eaton*, 10 N. H. 561; *Belton v. Briggs*, 4 Des. 464; *Phillips v. Green*, 5 T. B. Mon.

345; *Thomas v. Gammel*, 6 Leigh, 9; *Sanford v. McLean*, 3 Paige, 117; *Webb v. Hall*, 35 Maine, 336; *Holmes v. Blogg*, 8 Taunt. 35; *Richardson v. Boright*, 9 Vt. 368; *Salmon v. Cutts*, 5 Eng. L. & Eq. 93; *Dublin, etc., R. W. Co. v. Black*, 16 Eng. L. & Eq. 556; *Doe v. Abernathy*, 7 Blackf. 442; *Hartman v. Kendall*, 4 Ind. 403; *Blankenship v. Stout*, 25 Ill. 132.

We are aware that there are other cases, besides those cited by counsel for appellees, which hold that an infant is not required on arriving at age to disaffirm the deed before bringing his action; but we are satisfied from a very careful and thorough examination of the text books and adjudged cases, that the very decided weight of authority requires that there must be a disaffirmance of the deed before the action is brought, and, in our opinion, this view is supported by reason, and required by public policy. As there was no act done by the appellee Nancy before bringing her action to disaffirm her deed, we are not required to decide what acts will amount to a disaffirmance, and for the same reason we cannot decide within what time such acts must be done after the infant arrives of age. The authorities all agree that the contract must be disaffirmed within "a reasonable time" after the infant arrives of age, but there is great diversity of opinion as to what is "reasonable time." An examination of the above authorities will show that the time required ranges from one to twenty years, according to the peculiar circumstances of each case and the views of different judges and writers. A proceeding for the assignment of dower cannot be maintained unless it is alleged and proved that there had been a demand made for dower before the commencement of the action. Secs. 66 and 67, ch. 45, R. S. 1843, p. 804; *Wells v. Sprague*, 10 Ind. 305.

The question we are considering is the disaffirmance of the contract, and not the time within which the action must be brought. The distinction between the two things is well and clearly stated by WORDEN, J., in *Potter v. Smith*, 36 Ind. 231, where it is said: "The distinction between bringing,

Law et al. v. Long et ux.

and laying the foundation for an action must not be disregarded. There are cases where a man must act promptly and within a reasonable time, in order to be entitled to an action; *e. g.*, if he finds himself defrauded in a contract, he may be required, in order to rescind, to act promptly on the discovery of the fraud, and tender back to the other party what he has received, thereby placing him *in statu quo*, and demand a rescission; but having done all that is necessary to entitle him to a rescission, he may bring his action therefor at any time before he is barred by the statute."

The appellants did not plead the statute of limitations in bar of the action for dower, but only to the recovery of damages. As there are exceptions to the statute in favor of the appellee Nancy, she having been and now being a married woman, the statute must be pleaded. *Potter v. Smith, supra*. The question as to the statute of limitations is not before us, and we decide nothing in reference thereto.

It is contended by counsel for appellants that the appellee Nancy cannot maintain this action without paying or tendering back the purchase-money for the premises in dispute.

Such is the general rule of the law; but it does not apply in the case of an action brought to avoid a deed made by an infant *feme covert*. *Pitcher v. Laycock*, 7 Ind. 398; *Miles v. Lingerman*, 24 Ind. 385; *Cresinger v. Lessee of Welch*, 15 Ohio, 156; *Markham v. Merrett*, 7 How. Miss. 437; *Shaw v. Boyd*, 5 S. & R. 309; *Roof v. Stafford*, 7 Cow. 179; 2 Scrib. Dower, 284.

It is also claimed by counsel for appellants that Scott and Mrs. Kendall, being *bona fide* purchasers for value, will hold the land purchased by them from Law, free from the claim of dower.

The question thus presented has been, and still is, to some extent, a vexed question. There has been in England, and in this country, among learned judges and eminent law writers, great diversity of opinion, but it now seems to be the settled American doctrine that the plea of a *bona fide* pur-

chaser for value is no defence, even in a court of equity, against a legal claim for dower.

2 Scribner Dower, 157, thus states the law: "But in the American courts the doctrine is well settled that the plea of a *bona fide* purchaser for value, is no defence, even in a court of equity, against a legal claim to dower."

Judge Story, in his work on Eq. Jur., sec. 630, states the law as follows: "Indeed, so highly favored is dower, that a bill for a discovery and relief has been maintained, even against a purchaser for a valuable consideration without notice, who is, perhaps, generally as much favored as any one in courts of equity. The ground of maintaining the bill, in such a case, is, that the suit for dower is upon a legal title, and not upon a mere equitable claim, to which only the plea of a purchase for a valuable consideration has been supposed properly to apply. This decision has been often found fault with, and, in some cases, the doctrine of it denied. It has, however, been vindicated, with great apparent force, upon the following reasoning: It is admitted that dower is a mere legal right; and that a court of equity, in assuming a concurrent jurisdiction with courts of law upon the subject, professedly acts upon the legal right; for dower does not attach upon an equitable estate. In so acting, the court should proceed in analogy to the law, where such a plea, of a purchase for a valuable consideration without notice, would not be looked at; and, therefore, as an equitable plea, it should also be inadmissible. But this analogy will not hold, where the widow applies for equitable relief, as, for the removal of terms out of her way, or for a discovery. In the latter cases, the equitable plea, of a purchase for a valuable consideration without notice, cannot be resisted. In the former case, the widow, proceeding upon the concurrent jurisdiction of the court, merely enforces a right, which the defendant cannot at law resist by such mode of defence. In the latter case, she applies to the equity of the court to take away from him a defence, which, at law, would protect him against her demand."

Law et al. v. Long et ux.

We have made a careful examination of the English and American elementary works and adjudged cases; and, while we find some conflict, we are of opinion that the very decided weight of authority preponderates in favor of the doctrine stated by Scribner and Story, as above quoted; and in support of such views, we refer to the following authorities:

Beames Eq. 234, 245; 1 Roper Hus. & Wife, 447; Mitford Ch. Pl. by Jeremy, 274; 1 Fonb. Eq. 1, chap. 4, sec. 23, and note; 2 Fonb. Eq. 2, chap. 6, sec. 2, note *h*; *Williams v. Lambe*, 3 Brown C. C. 264; *Collins v. Archer*, 1 Russ. & Mylne, 284; *Rogers v. Seale*, 2 Freem. 84; *Medlicott v. O'Donel*, 1 Ball & B. 171; *Ridgeway v. Newbold*, 1 Harring. Del. 385; *Stinson v. Sumner*, 9 Mass. 138; *Brown v. Wood*, 6 Rich. Eq. 155; *Blain v. Harrison*, 11 Ill. 384; *Rankin v. Oliphant*, 9 Mo. 239; *Larrowe v. Beam*, 10 Ohio, 498; *Wailes v. Cooper*, 24 Miss. 208; *Blake v. Heyward*, Bailey Eq. 201; *Robinson v. Bates*, 3 Met. 40; *Daniel v. Hollingshead*, 16 Ga. 190; *Campbell v. Murphy*, 2 Jones Eq. 357; *Gano v. Gilruth*, 4 Greene Iowa, 453; *Jenkins v. Bodley*, Sm. & M. Ch. 338.

We are of opinion that the fact that Scott and Mrs. Kendall were *bona fide* purchasers for value, constitutes no defense to the action, but that the action cannot be maintained unless the deed of the said Nancy was disaffirmed in some mode known to the law before the commencement of the action; and for failure to establish such a disaffirmance, the judgment must be reversed.

The judgment is reversed, with costs, and the cause remanded, with directions to grant a new trial, and for further proceedings in accordance with this opinion.

A. Major and *S. Major*, for appellants.

K. M. Hord and *A. Blair*, for appellees.

INDEX.

ABORTION.

See CRIMINAL LAW, 2, 3.

ACCORD AND SATISFACTION.

See PLEADING, 5.

ACTION.

Death Caused by Wrongful Act. See RAILROAD, 1 to 5.

AFFIDAVIT.

See DIVORCE, 1; PRACTICE, 23; SUPREME COURT, 18, 19.

AMENDMENT.

See CITY, 10; PRACTICE, 3, 10; RAILROAD, 2.

1. *Name.*—Where the Christian name of a plaintiff is incorrectly stated in the complaint, but properly given in the summons, it is not error in the court to permit amendment. *Ferguson v. Ramsey*, 511
2. *Description of Land.*—In an action for the failure of the defendant to account to the plaintiff for the proceeds of certain real estate sold by the defendant as agent of the plaintiff, an error in the complaint in the description of the land sold, which was not shown to have misled the defendant, was properly corrected on motion when the error appeared by the evidence. *Ib.*

APPEAL.

See ATTORNEY, 3; CITY, 6; COSTS, 1, 2; COUNTY CLERK, 3; CRIMINAL LAW, 7; EXECUTOR AND ADMINISTRATOR, 1; INJUNCTION, 2; PARTITION; SET-OFF, 3; SUPREME COURT.

Interlocutory Orders.—*Supersedeas.*—*Attachment.*—The section of the code authorizing appeals from interlocutory orders, which requires an appeal bond to be filed when the appeal is taken, does not require any additional bond in order to suspend the proceedings for thirty days; but an appeal from an order of injunction does not allow a party to do an act, which by the injunction he is forbidden to do. The stay of proceedings upon the appeal is peculiarly applicable to other classes of cases mentioned in the section. The arrest of a party for disobeying an order of injunction, within thirty days after appeal, and after the issuing of an ordinary supersedeas, is not an act in disregard of the authority of the Supreme Court. An ordinary supersedeas is not appropriate in such a case.

The State, ex rel. Matthews, v. Chase et al., 356

APPEAL BOND.

1. *Suit On.—Pleading.—Clerk.*—A complaint upon a bond given on appeal to the Supreme Court alleged that the court granted the appeal and approved of the surety, that the bond was taken and approved by the clerk below, that the cause was certified to the Supreme Court, where the judgment was affirmed, and that it was still unpaid, but it did not aver that the penalty of the bond was fixed by the court, or that the court directed the time within which the bond should be filed, or that it was filed within the time, or that execution and other proceedings were stayed upon the judgment during the pendency of the appeal.
Held, that the complaint was not sufficient on demurrer. Neither the clerk of the Supreme Court nor the clerk of the court below has power to take or approve an appeal bond when the appeal is taken in term. There was no consideration shown for the appeal bond. The question was not whether execution and other proceedings were in fact stayed on the judgment during the pendency of the appeal, but whether the bond was legally operative as a *supersedeas*. *Ham et al. v. Greve et al.*, 531
2. *Same.*—A complaint in such a case must show the bond to have been executed according to the statute, or that the defects were waived, either expressly or by implication. *Id.*
3. *Same.—Judgment Without Relief.*—A judgment on an appeal bond should not be rendered without relief from valuation or appraisement laws, where it is not so provided in the bond. *Id.*

ARREST.

See APPEAL; CRIMINAL LAW, 1.

ASSIGNMENT OF ERROR.

See PRACTICE, 11, 13; SUPREME COURT, 1, 2, 3, 9, 11 to 16, 21; KERCHAVAL v. THE STATE, 478.

ATTACHMENT.

See PROMISSORY NOTE, 2.

ATTORNEY.

See PROMISSORY NOTE, 5.

1. *Suspension of.*—The provisions of the statute for the suspension of an attorney from practice are penal in their nature, and should be strictly construed. *Klingensmith v. Kepler*, 341
2. *Same.—Partnership.*—An attorney cannot be suspended from practice by the default of his partner in collecting and converting the money of a client without his knowledge or consent. *Id.*
3. *Same.—Appeal.—Notice of.*—Where a judgment was rendered for money, and also suspending two partners, attorneys, from practice, one appealed from the judgment of suspension.
Held, that the judgment of suspension was personal only to the appellant, and section 551 of the code (2 G. & H. 270), requiring notice of appeal to be served on co-parties, did not apply. *Id.*

BASTARDY.

Imprisonment.—Constitutional Law.—Statute.—The provision of the bastardy act which authorizes the court to require the defendant to replevy the judgment by good freehold surety, or in default thereof to commit such defendant to jail until such security be given, is not in conflict with the latter clause of the twenty-second section of article one of the constitution of Indiana. *Ex Parte Teague*, 278

BILL OF EXCEPTIONS.

See NEGLIGENCE, 4; PRACTICE, 8; SUPREME COURT, 19, 20; VINES *v.* LONG-ACRE, 144.

1. *Motion for New Trial*.—A statement in a motion for a new trial, that the court refused to permit a witness to testify as to certain facts, cannot be taken as true by the Supreme Court, unless sustained by a proper bill of exceptions. *Skillen v. Skillen, Jr.*, 122
2. *Striking Out*.—If a demurrer to a paragraph of a complaint is overruled, and the paragraph is afterward struck out on motion, and not again put into the record by a bill of exceptions, it is not a part of the record, and the overruling of the demurrer to it cannot be assigned as error. *Reeves et al. v. Plough*, 204
3. *Same*.—A question arising upon the action of a court in striking out a paragraph of a pleading can only be reserved by a bill of exceptions. *Ib.*
4. *New Trial*.—Where the error assigned in the Supreme Court is the overruling of a motion for a new trial, and the paper copied into the record as a bill of exceptions was not filed within the time limited by the court, there is no question presented for decision on appeal. *Scrannage v. Russell et al.*, 277
5. *Evidence*.—A paper purporting to be a bill of exceptions, consisted of a certified agreement, signed by counsel of both parties and the judge of the court below, that "the following was all the evidence that was offered in said cause by both parties, together with all the exhibits, plats, maps, etc., and is submitted to this court by the agreement of the parties as all the evidence," to which, after the signatures of counsel and the judge, were attached various documents and what purported to be the evidence of witnesses. *Held*, that the evidence was not in the record. *Goodwine et al. v. Crane*, 335
6. *Same*.—The Supreme Court cannot decide whether the finding of the court below is or is not sustained by the evidence, where the evidence is not in the record by bill of exceptions. *Ib.*
7. *Same*.—Under the code, a written instrument, or any documentary evidence, need not be copied into a bill of exceptions, but may be referred to, if its appropriate place be designated by the words "here insert;" but testimony given in the cause must be set out in the bill of exceptions. *Ib.*
8. *Same*.—The statement in a bill of exceptions, that "the following was all the evidence offered" does not show how much evidence was admitted. *Ib.*
9. *All the Evidence*.—The words, "this is all the testimony given in the cause," in a bill of exceptions, were held sufficient to show that all the evidence given in the cause was contained therein. *O'Brien et al. v. Flanders*, 486

BOND.

See APPEAL BOND.

BURDEN OF PROOF.

See LIQUOR LAW, 1; RAILROAD, 10.

CANAL.

See EMINENT DOMAIN, 1, 2, 3; REPEAL OF LAWS.

CASES OVERRULED, MODIFIED, EXPLAINED, ETC.

1. *Sheriff's Sale*.—*Sale in Parcel*.—*Sowle v. Champion*, 16 Ind. 165, explained by more particular statement of facts from the transcript. *Voss v. Johnson*, 19
2. *Riparian Owner*.—*Wharf*.—*Bainbridge v. Sherlock*, 29 Ind. 364, modified. *Sherlock et al. v. Bainbridge*, 35
3. *Pleading*.—*Evidence*.—*Demurrer*.—*Catlett v. Gilbert*, 23 Ind. 614, criticised. *Allis et al. v. Nanson et al.*, 154

4. *Eminent Domain.—Canal.—Ice.—Edgerton v. Huff*, 26 Ind. 35, overruled.
The Water Works Co. of Indianapolis et al. v. Burkhart et al., 364

CERTIORARI.

See SUPREME COURT, 18.

CITY.

See PRACTICE, 8, 9.

1. *Common Council.—License to Sell Intoxicating Liquors.—Penalty.*—The common council of a city, incorporated under the act of 1867, has power to pass an ordinance requiring a license to authorize the sale of intoxicating liquors in said city, and to charge for such license the sum of three hundred dollars, and to impose penalties for the violation of the ordinance.
Sweet v. The City of Wabash, 7
2. *Same.—Evidence.—License by County Commissioners.—Internal Revenue Tax.*—On a trial for the violation of such an ordinance, the defendant cannot introduce proof that he has obtained a license from the board of commissioners of the county in which the city is situated, or that he has paid the tax imposed by the internal revenue act. *Id.*
3. *Same.—Power “to Exact License Money.”—“To Regulate.”—Prohibition.—Act of 1859.*—Neither the power conferred on the city council “to exact license money,” nor that “to regulate,” confers the power to prohibit the sale. The act of 1859, to regulate and license the sale of intoxicating liquors, construed together with the act of 1867 for the incorporation of cities, shows that the power was conferred on cities to exact a tax for revenue and for police regulation, but not the power to prohibit the sale. *Id.*
4. *Same.—Evidence of Amount of Tax being Prohibitory.*—What will amount to a prohibitory tax, is a question of fact. On a trial for the violation of such an ordinance, evidence is proper to show that the amount of the tax imposed is in effect prohibitory of the sale. DOWNEY, J., dissents as to this ruling, regarding the question as not being presented in this case; and holding that the question is not one to be left to the court or jury as a question of fact or as a question of law and fact. *Id.*
5. *Nuisance.*—A city of this State incorporated under a charter authorizing the common council “to regulate all wharves on the shore of the Ohio river, adjoining said city,” cannot by ordinance define the line of high-water mark, and declare the erection of buildings below said line a nuisance, and impose a fine upon persons erecting such buildings on their own lands.
City of Evansville v. Martin et al., 145
6. *Street Improvement.—Appeal.—Pleading.*—Upon appeal from a precept issued in favor of a contractor for work done in improving a street of a city, a complaint which does not aver that an advertisement for bids or the letting of the contract was ever made is bad on demurrer. PETTIT, C. J., dissented, holding that an averment that an advertisement for bids was made is an averment of a fact which must precede the letting of the contract, and which therefore cannot be inquired into on appeal.
Stewart v. City of Jeffersonville, for the use of Sweeney et al., 153
7. *Appeal from Precept.—Transcript.*—On an appeal from a precept issued for the collection of an assessment for a street improvement, if it appears from an amended transcript that the precept was issued on an imperfect final estimate, and that the perfected final estimate was filed after the appeal was taken, and after a demurrer was sustained to the original transcript, the amended complaint or transcript will be bad on demurrer.
Lammers v. Balfe et al., 218
8. *Precept.—Common Council.*—The common council has no right to issue a precept on an improper assessment. *Id.*

9. *Correcting Final Estimate and Assessment.*—The making of a correct assessment, after a precept has issued on an incorrect one, cannot relate back so as to make the precept good and defeat an appeal from the precept. *Ib.*
10. *Amendment of Transcript.*—Where an act has been properly done, and the transcript does not show such act, and for that reason a demurrer is sustained to the transcript, an amendment may be made to the transcript, showing that such act was done. *Ib.*
11. *Assessment for Street Improvement.—Common Council.*—The final estimate and assessment for a street improvement in a city may be amended or corrected by the common council. *Ball v. Balfé et al., 221*
12. *Same.—Married Woman.*—Coverture is no reason why real estate belonging to a person under such disability should not be assessed for its share of the cost of a street improvement. *Ib.*
13. *Same.—Appeal from Precept.—General Denial.—Evidence.*—On an appeal from a precept issued for the collection of an assessment for a street improvement, under the general denial, the contractor must prove that the proceedings of the officers subsequent to the order directing the work to be done have been regular, that a contract was made, that the work has been done in whole or in part, according to the contract, and that the estimate has been properly made thereon. *Ib.*
14. *Same.—Transcript.—Advertisement.*—The transcript on an appeal from a precept to enforce an assessment for a street improvement must show an advertisement for proposals to do the work.
Brookbank v. The City of Jeffersonville for the use of Sweeny et al., 406
15. *Same.—Quorum of Council.*—The transcript must also show a quorum of the common council present at the meetings mentioned therein. *Ib.*
16. *Same.—Remonstrance.*—A remonstrance against the proposed improvement is not a part of the transcript. *Ib.*
17. *Same.—Constitutional Law.—Manner of Sale.*—The seventy-first section of the act for the incorporation of cities, directing the manner of sale of property for a street improvement, is not in conflict with section twenty-two of article four of the constitution, prohibiting special legislation regulating the practice in courts of justice. *Ib.*
18. *Same.—Finding of Court.—Amounts and Dates.*—The finding of the court should show the dates and amounts of the several assessments, and from such finding the sheriff can calculate the interest to the date of the sale. *Ib.*
19. *Same.—Costs.*—The costs which accrue upon an appeal from a precept, except the costs of the sale, should be adjudged against the losing party personally. *Ib.*

COLLATERAL SECURITY.

See PLEDGE.

CONSIDERATION.

See FRAUD, 1; VENDOR AND PURCHASER, 7, 8.

CONSTABLE.

See CRIMINAL LAW, 1.

1. *Execution.—Form.*—A paper issued by a justice of the peace to a constable, reciting the rendition of a judgment, as appears of record on his docket, and adding the words "by levy and sale of the goods" of defendant, "and make return thereof within six months from date," without other words of command or direction, will not justify a levy by the constable.
Gaskill v. Aldrich, 338
2. *Same.—Sale.*—Personal property must be present and subject to the view of

those attending a constable's sale. And the sale, in good faith, by a constable, of a hog, in a pen from one to two hundred rods from the place of sale, and entirely out of sight, is unauthorized. *Id.*

CONSTITUTIONAL LAW.

See BASTARDY; CITY, 17; CRIMINAL LAW, 4; RAILROAD, 3.

CONTEMPT.

See APPEAL.

Practice.—In a proceeding for an alleged constructive contempt, except, perhaps, where it is to enforce a civil remedy, if the person charged fully answers all the charges against him, he will be discharged as to the attachment, and the court cannot afterward hear evidence to impeach or contradict him. *The State v. Earl*, 464

CONTINUANCE.

See PRACTICE, 23.

CONTRACT.

See PLEADING, 10; VENDOR AND PURCHASER, 5.

1. *Construction.*—Where it is represented and guaranteed, that a stock of goods will inventory, at "wholesale prices," a certain sum, the language will be taken to mean the wholesale prices at which they were purchased, and not the value that may be put upon them at the time the representation and guaranty are made. *Dodge et al. v. Dunham*, 186
2. *For Benefit of Third Person.*—Where A. delivers a sum of money to B., on his promise to deliver the same to C., as a gift from A., the money may be recovered from B., on his refusal to deliver it, by C., in an action for money had and received to his use. *Miller v. Billingsly*, 489
3. *Same.—Law and Equity.—Rule Under the Code.—Trustee.*—In actions at law, privity of contract is essential; the rule is otherwise in equity, and the systems being blended in this State, a party, not known as a contracting party, but for whose benefit the contract was made, may maintain a suit to enforce the contract under the code, even although ignorant of the contract at the time when it was made, if when informed thereof he accept its provisions. The party receiving the money is treated as a trustee for the beneficiary. *Id.*

CORPORATION.

See CITY; DRAINING ASSOCIATION; INSURANCE; PRACTICE, 2; RAILROAD; TOWN; TURNPIKE.

1. *Capacity to Sue.*—Capacity to sue is one of the capacities of every corporation. *Estell v. The Knightstown, etc., Co.*, 174
2. *Power to Hold Real Estate.*—With reference to their power to take and hold real estate, corporations may be classified as follows:
 - First.* Those whose charters, or laws of creation, forbid that they should acquire and hold real estate. Such corporations cannot take and hold real estate, and a deed or devise to such a corporation can pass no title.
 - Second.* Those whose charters, or laws of creation, are silent as to whether they may or may not acquire and hold real estate. In such a case, if the objects for which the corporation is formed cannot be accomplished without acquiring and holding real estate, the power so to do will be implied.
 - Third.* Those whose charters, or laws of creation, authorize them, in some cases, and for some purposes, to take and hold the title to real estate.
 - Fourth.* Those whose charters, or laws of creation, confer upon them a general power to acquire and hold real estate. Corporations thus empowered

may take and hold real estate, as freely, and fully, and perfectly as natural persons may take and hold. *Hayward et al. v. Davidson et al.*, 212

3. *Same.—County.*—Counties are *quasi* corporations, and fall within the third class above given, and in some cases, and for some purposes, are authorized to take and hold title to real estate. They are expressly empowered to acquire and hold title to real estate for a location for county buildings and for a poor farm, and there may be other instances. *Id.*
4. *Same.*—Where a corporation is authorized to acquire and hold title to real estate for some purposes, it cannot be made a question by any party, except the State, whether or not real estate acquired by such corporation has been acquired for the authorized uses or not. *Id.*

COSTS.

See CITY, 19; COUNTY CLERK, 3; PRACTICE, 7.

Security for. See PRACTICE, 2.

1. *Justice of the Peace.—Judgment.—Appeal.*—Section 398, 2 G. & H. 227, providing, that in all actions for damages solely, not arising out of contract, if the plaintiff does not recover five dollars, he shall recover no more costs than damages, does not apply to cases appealed from a justice of the peace; but in such cases costs follow judgment under, and with the exceptions found in, section 70, 2 G. & H. 597. *Castle v. House*, 333
2. *Same.*—If, in an action of trespass *quare clausum fregit*, before a justice of the peace, a judgment is recovered by the defendant, from which the plaintiff appeals to the circuit court, and there recovers a judgment for less than five dollars, the general rule prevails, that costs follow the judgment, and he also recovers costs. *Id.*
3. *New Trial.*—The court, upon granting a new trial, should make the proper order as to accrued costs, considering the reasons for granting the new trial. The order should not relate to future costs.

Swingle v. The Bank of the State, 423

COUNTY.

See CORPORATION, 2, 3, 4; WILL.

COUNTY CLERK.

See APPEAL BOND, 1; SUPREME COURT, 19, 20.

1. *County Commissioners.—Allowance to Clerk for Extra Services.*—Before county commissioners can make an allowance to a clerk, under the provisions of the act of 1861 (2 G. & H. 652), the clerk must take and subscribe an oath or affirmation to the truth of his charges. Subscribing his name to the charges is in no sense subscribing to the oath or affirmation. *Nave v. Ritter*, 301
2. *Same.*—A certificate of the auditor, that the claim so subscribed has been "subscribed and sworn to in open court," is not sufficient; it does not show that the clerk has subscribed and sworn to the truth of the charges. *Id.*
3. *Criminal Prosecution.—Appeal.—Transcript.—Costs.*—The clerk of the court, in a criminal prosecution, on conviction of the defendant, is required by law, when the defendant appeals to the Supreme Court, to make out and deliver to him a transcript of the papers, proceedings, and judgment, without the previous payment of his fees therefor. *The State, ex rel. Morris, v. Wallace*, 445
4. *Constitutional Law.*—The clerk takes his office with its burdens, and the constitutional provision touching services without compensation does not apply to him. *Id.*

COUNTY COMMISSIONERS.

See COUNTY CLERK, 1, 2.

COVERTURE.

See CITY, 12; HUSBAND AND WIFE.

CRIMINAL LAW.

See COUNTY CLERK, 3, 4; LIQUOR LAW.

1. *Justice of the Peace.—Constable.—Jurisdiction.—Fugitive.—Arrest.—Warrant.*—A warrant issued by a justice of the peace for the arrest of a person duly charged before him with the commission of a crime or misdemeanor, and who has left the county in which the offence was committed, and where the warrant was issued, may be served by a constable of said county in any other county where the defendant may be found, upon attaching a certificate of the clerk of the said county where such warrant was issued, setting forth that the justice signing the warrant is duly commissioned and qualified as such, and that his signature is genuine.

Sturm v. Potter, 181

2. *Abortion, Attempt to Produce.—Statute.*—The statute makes an attempt to produce miscarriage a criminal act, unless the miscarriage is necessary to save the life of the woman.

Bassett v. The State, 303

3. *Same.—Indictment.*—An indictment for an attempt to procure an abortion charged that an instrument was used to produce a miscarriage, "the employment of said instrument not being necessary to preserve the life of the woman," without alleging that the miscarriage was not necessary to save the life of the woman.

Held, that the indictment should have been quashed on motion.

Id.

4. *Change of Venue.—Practice.*—Where a change of venue in a criminal case is taken from a circuit judge on the ground of his supposed prejudice, he may call any other circuit judge or common pleas judge to hold the circuit court and try such cause, either at the pending term or a succeeding regular or adjourned term; but the judge possesses no power to set such cause down for trial during vacation.

Ex Parte Skeen, 418

5. *Civil Code.—Sections 15 and 16.—Poor Persons.*—Sections fifteen and sixteen of the civil code, referring to the prosecution and defence of actions by poor persons, have no application to the defence of criminal prosecutions.

The State, ex rel. Morris, v. Wallace, 445

6. *Same.—Section 558.*—Section five hundred and fifty-eight of the civil code, 2 G. & H. 273, has no reference to criminal cases.

Id.

7. *Criminal Code.—Appeal.*—Appeals in criminal actions are taken in the manner, and in the cases, prescribed in article fourteen of the criminal code, 2 G. & H. 425, section 149, and are not governed by the civil code.

Id.

DAMAGES.

See EXECUTOR AND ADMINISTRATOR, 2; PLEADING, 1; RAILROAD, 8, 9, 10; TURNPIKE, 10.

DECEDENTS' ESTATES.

See EXECUTOR AND ADMINISTRATOR.

1. *Sale of Real Estate.—Notice of Petition.—Widow.*—Where real estate of a decedent was sold by the administrator, under an order of court, for the purpose of paying debts of the deceased, but no notice was given of the pendency of the petition for the sale, but a writing containing a waiver of notice and consent to the sale was signed by the widow as guardian of minor heirs, but not in her own right as widow;

Held, in an action for partition brought by the widow, that the sale did not pass the widow's one-third of the real estate to the purchaser, and that the record of the proceedings and order of sale were inadmissible in evidence to show the sale of said one-third. *Helms v. Love*, 210

2. *Petition to Sell Lands in Two Counties.—Publication of Notice.*—Where lands situated in Ripley county were sold in the course of administration, on petition of the administrator in Decatur county to sell other lands lying in Decatur county, with the lands situated in Ripley county, it was not necessary that the notice of the petition to sell should be published in Ripley county, the administration being in Decatur county, where publication was made. *Gavin et al. v. Graydon*, 559

3. *Same.—Jurisdiction of Common Pleas to Try Title.—Conclusiveness of Judgment.*—Where, after the land had been struck off, but before confirmation of the sale, an heir of the deceased, against whom publication had been made, appeared and contested the title of the estate to one undivided half interest in the property in Ripley county, alleging that he had conveyed to the deceased one undivided half interest only in said land, and that the deed had been fraudulently altered so as to convey the entire interest therein, and thereupon an issue was formed and tried, resulting in a finding that the deed had not been altered, and the sale was confirmed;

Held, that the court of common pleas had jurisdiction to try the title, and that the finding was conclusive on the heir, and could not be attacked in a proceeding in the circuit court against the purchaser. *Id.*

4. *Same.*—The record of a domestic court of general jurisdiction need not show affirmatively jurisdiction over the person of the parties, to authorize its introduction in evidence in a collateral proceeding. An application to sell land in the course of administration stands upon the footing of an ordinary adversary judicial proceeding in a court of superior jurisdiction, and where jurisdiction has once been acquired, subsequent errors will not subject the proceeding to collateral attack. *Id.*

5. *Same.—Appearance.*—The heir having appeared after the sale and made his objection in hostility to the title of his ancestor, and that objection having been overruled, and the sale confirmed, and the purchase-money paid, he was concluded by that judgment, so long as it stood unreversed, and he could not be heard to make other objections to the proceedings afterward. *Id.*

6. *Jurisdiction.—Circuit Court.—Set-Off.*—The circuit court has no jurisdiction to entertain a suit to have a claim against an estate set off against a judgment in favor of such estate. *Reno v. Robertson, Adm'r*, 567

7. *Practice.—Set-Off of Claim Against Estate Against Judgment.*—While such a claim is not reduced to judgment, the set-off cannot be obtained on mere motion, but a suit must be instituted for that purpose; and if the estate be insolvent, and the defendant in the judgment have no other method of obtaining satisfaction of his claim against the estate but by a set-off of the claim against the judgment, the court of common pleas may grant him relief. *Id.*

DEMAND.

See DOWER, 1; PROMISSORY NOTE, 4.

DEMURRER.

See BILL OF EXCEPTIONS, 2; NEW TRIAL, 4; PLEADING, 14, 15; PRACTICE, 6; SUPREME COURT, 6.

1. *Complaint.—Answer.*—A defective complaint will be so adjudged on a ruling upon a demurrer to a bad answer.

Hain v. The N. W. Gravel Road Co., 196

2. *Defective Record.*—Where a demurrer has been sustained to a complaint, and the demurrer does not appear in the record, if for any cause reached by demurrer the complaint is defective, the ruling will be affirmed.

Davis v. Perry et al., 305

3. *Same*.—Where a demurrer has been filed and overruled, and the demurrer does not appear in the record, the court will presume it was overruled on account of its own defects, or because it presented some objection to which the pleading was not liable. The rule would probably be different where the demurrer was sustained, and it appeared that the pleading was not liable to a demurrer for any cause.

Crowell et al. v. The City of Peru et al., 308

DEPOSITION.

Suppression of. See NEW TRIAL, 8.

DIVORCE.

Affidavit for Publication of Notice.—*Sufficiency*.—An affidavit to authorize publication of notice of a pending proceeding for divorce may be sufficient although not positive, but as the deponent "is informed and verily believes."

Bonsell v. Bonsell, 476

DOWER.

See MINOR, 1, 3, 5.

1. *Proceeding for Assignment of Dower*.—*Demand*.—A proceeding for the assignment of dower under the Revised Statutes for 1843 cannot be maintained, unless it is alleged and proved that there has been a demand made for dower before the commencement of the action.

Law et al. v. Long et ux., 586

2. *Purchaser*.—The plea of *bona fide* purchaser for value is no defence, even in a court of equity, against a legal claim for dower. *Id.*

DRAINING ASSOCIATION.

1. *Appraisers*.—*Schedule*.—Lands not liable to be affected at all, either beneficially or injuriously, along the line of a proposed drain, are not required to be returned by the appraisers appointed to make a schedule; and if no lands are injured, the appraisers may so declare in their return, and if in such case the schedule returned contain all the lands benefited, it will be sufficient.

The Pigeon Creek Draining Ass'n v. Lagrange, 272

2. *Same*.—*Notice, Informal or Irregular*.—*Recording*.—If the notice of the time and place, when and where the appraisers will begin the examination of the lands, be informal or irregular, still it does not invalidate the assessment, when the amount thereof is clearly set forth in the appraisers' schedule, which is properly recorded, due notice thereof being given. *Id.*

ELECTION.

Ineligible Candidate.—*Candidates for Different Offices*.—Where a majority of the ballots at an election are given to a candidate who is not eligible to the office, the ballots so cast are not to be counted for any purpose. They cannot elect the ineligible candidate or defeat the election of the opposing candidate by showing that he did not receive the majority of the votes cast at such election. It follows that the eligible candidate will receive the office, although less than a majority of the votes are cast for him. But this rule does not apply where two or more persons are candidates for different offices. Accordingly, although the office of one prison director is the same as that of another prison director, except it may be with reference to the time of election and the term for which he is to serve, still when one has been elected to succeed a designated person in such office, he cannot act as the successor of another in the same body, on the ground that the person who has been elected to succeed the other is ineligible.

Price v. Baker, Gov., 572

EMINENT DOMAIN.

See REPEAL OF LAWS.

1. *Legislative Authority.—Delegation of Power.*—The right of eminent domain is inherent in the government. It is not conferred, but limited, by the constitution, and the limit is not upon the amount of the estate to be taken, but it only requires just compensation. No property can be taken without legislative authority, and in the manner, and for the purposes, and to the extent authorized. Courts cannot extend or limit these. The necessity for such condemnation must be determined by the legislature, and cannot be questioned by the courts. If the legislature attempt under this power to take property confessedly not for public use, then the courts may prevent it. Where the State has taken a fee simple or authorized the taking thereof, and compensated the owner therefor, the subsequent abandonment of the use will not reinvest the owner with the title. If simply an easement is taken, the rule is otherwise. The right of determining the necessity of the work may be delegated, and courts and juries may be called upon to determine as to its necessity.

The Water Works Co. of Indianapolis et al. v. Burkhart et al., 364

2. *Canals.—Ice.*—The legislature of this State authorized its public agents to appropriate a fee simple in the lands taken for the construction of its canals. The former owner had no right to take ice from the canal. *Id.*
3. *Same.—Case Overruled.*—*Edgerton v. Huff*, 26 Ind. 35 overruled. *Id.*

ESTOPPEL.

See JUDGMENT; PROMISSORY NOTE, 3.

EVANSVILLE.

See CITY, 5.

EVIDENCE.

See BILL OF EXCEPTIONS, 5 to 9; GUARDIAN AND WARD, 7, 8, 10; HABEAS CORPUS, 2, 5; HUSBAND AND WIFE, 1, 7, 8; INSTRUCTIONS TO JURY, 1; JUDGMENT; NEGLIGENCE, 4; NEW TRIAL, 1, 4, 5, 8, 9; PLEADING, 15, 16; SURPRISE; VENDOR AND PURCHASER, 8.

1. *Order of Introduction of.*—Neither party is bound to anticipate the evidence of the other; and until the party having the burden of the issue has introduced evidence in support of such issue, it is unnecessary for the other to introduce evidence to defeat it. After that, it is his privilege to do so, and the other may close with rebutting evidence. *Dodge et al. v. Dunham*, 186
2. *Same.*—Where no evidence in support of a set-off is admissible under the allegations of the pleadings, it is not error to reject evidence offered by the defendant to rebut evidence given by the plaintiff in support of affirmative matter set up in reply to the set-off of the defendant. *Id.*
3. *Same.—Reiteration.*—It is not error to refuse to permit a witness to reiterate a statement. *Id.*
4. *Agreement as to Admission of.*—Where it is agreed between the plaintiff and the defendant, and entered of record, that all evidence may be given under the general issue, or general denial, it is necessarily and conclusively implied that a proper finding and judgment shall be rendered on the evidence thus introduced. *Talcott et al. v. Jackson et al.*, 201
5. *Same.*—By such agreement the parties waive the right to have the proper pleadings put upon file in the case, and cannot afterward complain that it was not done. *Id.*
6. *Immaterial Variance.—Failure of Proof.*—In a suit upon a promissory note, where it appeared by the copy of the note filed with the complaint that it was due "one day after date," and the note, introduced in evidence without objection, commenced "one — after date;"

Held, that this was not a failure of proof, as contemplated by section 96 of the code, but an immaterial variance, fully provided for by sections 94, 95, 101, and 580 of the code. *Brownlee v. Kenneipp*, 216

7. *Transactions with Ancestor of Plaintiff*.—*Statute*.—In a suit upon a promissory note, the defendant offered to testify to transactions between himself and the ancestor of the plaintiff, for the purpose of showing that the note in suit was given to the plaintiff, as one of the heirs of said ancestor, for the plaintiff's interest in said ancestor's real estate, which the defendant had purchased, and for which he executed the note in suit; and that he ought not to have given the note, because the ancestor was indebted to the defendant, by reason of transactions occurring between the defendant and said ancestor during the lifetime of the latter.

Held, that the evidence was not competent under the second proviso of the act of March 11th, 1867, 3 Ind. Stat. 561. *BUSKIRK, J.*, dissented, holding that the decision in *Peacock v. Albin*, 39 Ind. 25, authorized the introduction of the evidence. *Skillen v. Skillen*, 260

8. *Record of Deed*.—A record of a deed is proper evidence, and neither the original deed nor a certified copy thereof is required.

Bowers, Adm'r, v. Van Winkle, 432

EXECUTION.

See CONSTABLE, 1, 2.

EXECUTOR AND ADMINISTRATOR.

See DECEDENTS' ESTATES, 3, 4, 5; RAILROAD, 1 to 5.

1. *Appeal*.—*Superior Court*.—*Injury to Person*.—Where a judgment, recovered at a special term of the superior court, by a plaintiff, for an injury to his person, is reversed at a general term of said court, and remanded to special term for a new trial, and thereafter the plaintiff dies, no appeal lies from such reversal to the Supreme Court, in favor of the administrator of the deceased. *Stout, Adm'r, v. The I. & St. L. R. R. Co.*, 149

2. *Sale of Real Estate*.—*Report of Sale*.—*Remote Damages*.—To a complaint by an executor upon a promissory note, the defendant answered, that he gave the note for the payment in part of the purchase-money of land bought from the plaintiff as executor, and that said purchase was made, as the plaintiff well knew, for the purpose of selling a portion of the same to a certain railroad company, to erect a depot thereon, but that the plaintiff neglected to report said sale to the court and have the same confirmed and a deed made at the April term of the common pleas court, and until the September term thereof, whereby the sale thereof to the railroad company was lost, and the enhanced value of said land, which would have resulted from the erection of said depot was lost, to the damage of the defendant five hundred dollars, which sum he offered as a counter-claim. It was not alleged that the defendant did not know that the plaintiff would not report said sale; nor was it averred that the defendant moved the court to require such report, or that the plaintiff agreed to make such report at said term, or that the defendant had made a valid contract with the railroad company.

Held that the damages were too remote. *Gadbury et al. v. Stahl, Ex'r*, 348

3. *Executor Named Acting by Consent Without Qualifying*.—Where a will has been duly probated, and one of the heirs, legatees, or devisees under the will, named therein as executor, has by mutual consent and understanding of all the persons interested in the estate as such heirs, legatees, or devisees, acted as such executor and proceeded to make distribution of the personal property, without qualifying as executor, the husbands of a part of the heirs cannot, without notice to the person so acting as executor, on application to the clerk, have a stranger appointed as administrator with the will annexed, after the time for the person named as executor in the

will to qualify has expired. The heirs having consented that the person named as executor should act without qualifying, it would be a fraud on him and the other heirs, legatees, and devisees to assert that he had waived his right by not qualifying with the time limited by statute.

Hays et al. v. Vickery, 583

FEE BILL.

1. *Sheriff.—Justification of Officer.*—A fee bill, legal upon its face and showing jurisdiction in the court from which it issued, is a justification to an officer acting under it in making a levy and sale of property.
Miller v. Weida et al., 199
2. *Same.*—The fact that the costs for which the fee bill was issued were made by a party to the suit in which they originated, other than the party against whom the fee bill was issued, and should properly have been taxed to that other party, does not render the sheriff a trespasser. *Id.*

FOREIGN ADMINISTRATOR.

See RAILROAD, 4.

FRAUD.

See GUARDIAN AND WARD, 1; HUSBAND AND WIFE, 2, 5; PRACTICE, 5; STATUTE OF LIMITATIONS, 2.

1. *Consideration.*—The question of fraudulent intent in the conveyance of property is a question of fact, and want of consideration for the conveyance alone will not establish such intent, as against creditors.
Parton et al. v. Yates et al., 456
2. *Same.—Deed to Vest Legal Title in Equitable Owner.*—Where property has been conveyed to a husband, the consideration paid therefor being the property of his wife, and a note of the husband has been given for the remaining purchase-money, being one-third of the entire consideration, said note being secured by mortgage on the property conveyed, it is not fraudulent for the husband and wife, such note being still unpaid, to convey the property to a third person, and for such person to reconvey to the wife, in order to vest the title in her, she never having consented to the title's being vested in her husband. *Id.*

FUGITIVE.

See CRIMINAL LAW, 1.

GUARDIAN AND WARD.

See DECEDENTS' ESTATES, 1; HABEAS CORPUS, 2 to 5.

1. *Guardian's Sale.—Fraudulent Purchase.*—If a guardian sell the real estate of his ward, by order of the proper court, all the proceedings being formal and regular, and receive his own individual notes in payment, and fail to account to the proper court for the proceeds of the sale, the purchaser may be held accountable for the trust property, or its proceeds if sold by him to an innocent purchaser.
Wallace, Adm'r, v. Brown et al., 436
2. *Petition to Sell Real Estate.—Description of Ward's Interest.—Order of Sale.* Where the interest of a ward in certain real estate, under the statutes of 1843, was described, in a petition to sell the same, as a reversionary interest, created by a will which was referred to, and it was alleged that it would not accrue until after the decease of the guardian, who by the will had a life estate in the land, the averments sufficiently showed that the interest was in remainder and not in reversion. The mistake in calling the interest a reversionary one was not, therefore, material; where the order of the court was also broad enough to cover whatever interest the ward had in the land.
Worthington v. Dunham et al., 515

3. *Same.—Jurisdiction.*—If the court, having jurisdiction over the subject-matter and of the ward, who was represented in court by his guardian, erred in holding an insufficient petition to sell the real estate of the ward to be good, it was a mere error, and not a defect of jurisdiction. *Ib.*
4. *Omission to Sign Appraisement.*—The failure of the appraisers to sign their appraisement was a defect which did not avoid the sale as against purchasers in good faith, under section 27, Rev. Stat. 1843, p. 458. *Ib.*
5. *Private Sale.—Statutes of 1843, 1845, and 1847.—Innocent Purchaser.*—By the act of 1843, pp. 529, 530, sections 233, 239, as amended by the act of 1845, p. 17, and the act of 1849, p. 52, the court was authorized to make an order allowing the guardian to sell the land of his ward at private sale for two-thirds of its appraised value. Without this permission, such an order would not avoid the sale in the hands of an innocent purchaser, when the land sold for its full appraised value. *Ib.*
6. *Same.—Notice.*—Under sections 114, 118, R. S. 1843, p. 613, a notice was not contemplated in case of private sales. BUSKIRK, J., dissented. *Ib.*
7. *Jurisdiction.—Conclusive Presumption.*—As the probate court entertained and granted the petition, it must be presumed that it was shown to that court that the guardian was a duly appointed and qualified guardian of his ward, and that therefore it conclusively appeared that he took the necessary oath. *Ib.*
8. *Deed of Guardian.—Record.—Evidence.*—The act of 1847, p. 117, required the guardian's deed to be entered at length upon the final record, and therefore such record, including the deed, was admissible in evidence. *Ib.*
9. *Same.—Recitals.—Statute of 1847.*—Under section 2 of the act of 1847, p. 117, it was only necessary that a guardian's deed should contain succinct statements of the order of the court directing the sale, and the order confirming the same, and the order directing the conveyance. *Ib.*
10. *Sale.—Proceeding to Set Aside.—Purchaser in Good Faith.—Record Conclusive.*—On the trial of an action to recover land which had been sold by a guardian, on the ground that the proceedings were invalid, the plaintiff offered to prove that no sale of the land was ever made by the guardian; that his report of the sale and receipt of the purchase-money was untrue; that the transactions set forth in the probate record were the result of a barter and exchange between the guardian and the purchaser, the guardian taking the land received in exchange in his own name, and that no money was ever paid or agreed to be paid therefor by the purchaser from said guardian.
Held, that the evidence was not admissible against the defendant, who was a purchaser in good faith, and who had a right to rely upon the record, unless a knowledge of its falsity was brought home to him. *Ib.*

HABEAS CORPUS.

1. *Change of Venue.—Trial by Jury.*—A proceeding by *habeas corpus* is not a civil action within the meaning of section 207 of the code, authorizing a change of venue; nor is it a civil case within the meaning of section 20 of the bill of rights, authorizing a trial by jury. *Garner v. Gordon*, 92
2. *Petition by Mother.—Character.—Evidence.*—Where the petitioner claimed the custody of her two daughters, aged nine and eleven years, and the return alleged that she was an unsuitable person to be entrusted with the custody and moral and intellectual training of her infant daughters, and as evidence thereof it was charged that she was an unchaste and impure woman, and that her general character for chastity and virtue was bad in the neighborhood, the first allegation authorized proof of particular acts of unchastity; and under the second allegation her general reputation was involved, and the proof was not confined to two years, as provided in the divorce law; but having shown the character at the time of the trial, it was competent to show how long such reputation had been established. *Ib.*

3. *Same.—Mother and Guardian.—Custody of Children.*—Where the question as to custody is between the mother of female children and their guardian, the wishes of the parties should be placed out of view and the best interests of the children considered. If the mother be impure in life and in her associations, and keep in her possession immoral and vile publications, and wander about from place to place with evil company, having no home for her children, she is not a suitable person to have the care of them. *Id.*
4. *Same.—Custody Pending Appeal.*—It is error in a judge, after a finding in favor of the mother, and against the guardian, and after an appeal is prayed and bond given, to change the custody of the children from the guardian to the mother pending the appeal. *Id.*
5. *Same.—Evidence.—Past Treatment.*—Evidence was proper to inform the court how the children had been treated by the guardian and by those in whose custody he had placed them, and how they would likely be treated if the petitioner should receive the children into her charge. *Id.*

HUSBAND AND WIFE.

See CITY, 12; FRAUD, 2; MINOR, 1, 3, 5, 6; PARTNERSHIP, 1, 2.

1. *Evidence.—Wife.*—It is error to permit a petitioner in a writ of *habeas corpus* to testify to conversations had with the wife of the respondent, during his absence, there being no proof of agency. Nor can the wife testify to such conversations, she not being a party to the proceeding. *Garner v. Gordon, 92*
2. *Alienation of Real Estate.—Fraudulent Conveyance.*—A conveyance of real estate may be made by a husband to his wife without the intervention of trustees, and such conveyance will be upheld unless the rights of creditors are injuriously affected thereby. *Brookbank et ux. v. Kennard et al., 339*
3. *Same.*—A husband may convey to his wife a reasonable amount of property, leaving ample in his hands for the payment of his debts, and such conveyance will be valid, at least as against future creditors. *Id.*
4. *Same.—Recording Deed.*—That a conveyance, executed by a husband directly to his wife, has not been recorded for a year, and until after the contraction of debts by the husband cannot, of itself, render it void. *Id.*
5. *Partition.—Conveyance by Husband and Wife to Defraud Creditors.—Deed Set Aside.*—A complaint for partition alleged that the husband of the plaintiff died seized of the land in question, and that the plaintiff, as his widow, was the owner of one-third thereof, and her children, made defendants, of the other two-thirds; that before the death of her husband, he, with the plaintiff, conveyed the land to one M.; that after the death of the plaintiff's husband, the administrator of his estate procured an order of court setting aside the deed and directing the sale of two-thirds of said land to pay debts of said estate; that before the said decree setting aside said deed, the said M. reconveyed the land to the plaintiff; and she charged that the defendant L. claimed some interest in said land. The defendant L. answered, that the conveyance to M. was made to hinder and delay the creditors of the plaintiff's husband, and that the plaintiff knew the purpose and joined in the fraud; that she was made a party defendant to the suit to set aside the conveyance, and she answered therein denying any interest in said land, and asserting that it was the property of said M., and the court in said proceeding found and adjudged said deed to be fraudulent and void, and set it aside as to two-thirds of the land, and directed the same to be sold to pay the debts of the deceased, and adjudged costs against the plaintiff herein and said M., and under an execution issued thereon and levied upon the interest of M., in said land, the same was sold and was purchased by the defendant L.; that at said sale the said plaintiff represented to the public, and to this defendant, that she had no interest in said land, but that it was the property of said M.; and that

the deed from said M. was void, never having been delivered to her. A demurrer to this answer was overruled.

The plaintiff replied, alleging that the defendant L. had full notice of the title of the plaintiff, and that before he purchased said land at the sale upon execution, under said judgment for costs against M., the plaintiff in his presence made the proper demand on the sheriff to have the said one-third of said land set off to her, as the head of a family, under the law authorizing three hundred dollars to be thus set off. A demurrer was sustained to this reply, and the trial resulted in a finding for the defendant L. *Held*, that, admitting the complaint to be sufficient, and that the reply was bad, neither of which questions was decided, yet the proof having failed to show that the plaintiff had filed any answer denying her interest in said land, in the action to set aside the deed, and having also failed to show that she had informed the defendant L. at the sale that she had no title to the land, and the court having only ordered the two-thirds of the land to be sold to pay debts, the finding for the defendant was not sustained by the evidence.

Miller v. Long et al., 352

6. *Married Woman.—Subsequent Marriage.—Prohibition of Alienation.*—A married woman is prohibited from alienating, whether for life or in fee, absolutely or contingently, any real estate which she has acquired by virtue of a previous marriage, and it is immaterial whether there be children by such previous marriage or not; and a mortgage of such real estate is within the prohibition of the statute. *Bowers, Adm'r, v. Van Winkle*, 432

7. *Marriage.—Proof.*—In civil suits, except for criminal conversation, cohabitation and reputation are sufficient evidence of marriage. *Id.*

8. *Evidence.—Statements of Husband.*—After the marriage relation has terminated, the wife may testify as to statements made during its existence in her presence to other persons, by her husband, but she may not testify to communications made to her in private by her husband.

Mercer v. Patterson, 440

9. *Void Marriage.—Conveyance by Parties as Husband and Wife.—Bond of Married Woman.*—A man died, leaving a widow and infant daughter. The widow, in good faith, entered into what she believed to be a valid marriage contract, and with her supposed husband conveyed the real estate received from her former husband to A. The infant daughter married, and with her husband, also a minor, executed a title bond to A. to convey her interest in the same property, on attaining full age. The marriage of the widow was void, by reason of the prior undissolved marriage of the man with whom she supposed she had contracted marriage. Proceeding for partition of the land, said daughter and her husband being still minors.

Held, that the deed executed by the widow conveyed all her interest in the property, she being a *feme sole*, and there being no allegation of inadequacy of consideration, or that any fraud was practised by the purchaser. The third section of the statute, 2 G. & H. 348, which declares the issue of such marriage, begotten before the discovery of the disability, to be legitimate, does not change the relation of the parties to the marriage as to each other. *Held*, also, that the interest of the daughter was in no way affected by the title bond to convey on arriving at full age. Without regard to the question of minority, it was sufficient that, being a married woman, she could not enter into an executory contract.

Light v. Lane et al., 539

ICE.

See EMINENT DOMAIN, 1, 2, 3.

INFANCY.

See STATUTE OF LIMITATIONS, 1.

INJUNCTION.

See APPEAL, 1; RAILROAD, 15; VENDOR AND PURCHASER, 4.

1. *Verification of Complaint.—Restraining Order.*—No verification of a com-

plaint for injunction is required, where no restraining order or temporary injunction is sought before final judgment.

The Sand Creek Turnpike Co. et al. v. Robbins et al., 79

2. *Appeal.—Restraining Order and Temporary Injunction.*—Section 576, 2 G. & H. 277, authorizes an appeal from an interlocutory order dissolving an injunction in term. Restraining orders are limited in their operation to such reasonable time as may be necessary to notify the other party. Temporary injunctions are granted in vacation as well as in term, and usually continue in force until the further order of the court.

Bronenberg et al. v. Board of Commissioners of Madison Co. et al., 502

INSTRUCTIONS TO JURY.

See NEW TRIAL, 2; PRACTICE, 19, 21.

1. *Evidence.*—Where evidence on a question of damages has been ruled out on the trial, it is unnecessary for the court to instruct the jury to disregard it.
Grand Rapids, etc., R. R. Co. v. Horn et al., 479
2. *Jury.*—It is not error in the court to refuse to instruct the jury upon matters of known duty; as, that they should decide the case before them on the evidence, without prejudice, partiality, or favor. *Id.*

INSURANCE.

1. *Foreign Insurance Companies.*—*Statutes of 1852 and 1865.*—*Premium Note Void.*—The act of December, 1865, relating to foreign insurance companies, was intended as a substitute for the act of 1852, so far as the latter act related to such companies; and when the provisions of the act of 1865 are complied with, and the auditor of state issues his certificate authorizing the agent to act as such, his authority as agent is complete. Where a premium note was given for a policy in a foreign company, which had not complied with the law, and no certificate had been issued to the agent receiving the note, it was held that the note was void. *Hoffman v. Banks*, 1
2. *Life Insurance.*—*Insurable Interest.*—*Assignment to one not Having Interest.* A person cannot purchase and hold for his own benefit, as a matter of mere speculation, a policy of insurance on the life of one in whose life he has no sort of insurable interest.

Although a policy be issued to one who holds an insurable interest in the life, and be therefore valid in its inception, its assignment to one holding no such interest will not sustain an action in favor of the assignee upon the death of the person whose life is insured.

The Franklin Life Ins. Co. v. Hazard, 116

INTEREST.

Breach of Trust.—Interest is properly allowed where there has been a gross breach of trust.
Miller v. Billingsly, 489

INTERLOCUTORY ORDER.

See APPEAL.

INTERROGATORIES TO JURY.

1. *Imperfect Answers.*—Where the answers to interrogatories propounded to a jury are not full, if objection is urged to the discharge of the jury without a full finding, or if the court is asked to require the jury to find fully in answer to the interrogatories, the court should require such finding. But an objection to the finding cannot be made in the Supreme Court for the first time.
Reeves et al. v. Plough, 204
2. *Objection.—Waiver.*—An objection to the propounding of an interrogatory to a jury must be made when the interrogatory is submitted, that the court may modify or refuse the same; if the objection is withheld until the interrogatory is answered, it will be too late to be available.

Brooker v. Weber, 428

INDEX.

JUDGE.

See CRIMINAL LAW, 4; JURISDICTION.

JUDGMENT.

See APPEAL BOND, 3; DECEDENTS' ESTATES, 3 to 7; PLEADING, 9; PRACTICE, 7, 9; SET-OFF, 1 to 5.

Review of. See PLEADING, 7.

Evidence.—Estoppel.—Where a judgment is given in evidence, it is as conclusive in its effect as if it were specially pleaded by way of estoppel. The conclusiveness of a judgment rests not upon the doctrine of estoppel, but upon the ground that the whole community have an interest in holding the parties conclusively bound by the results of their own litigation.

Gavin et al. v. Graydon, 559

JURISDICTION.

See CRIMINAL LAW, 1; DECEDENTS' ESTATES, 3 to 7; GUARDIAN AND WARD, 3, 7; SUPREME COURT, 6.

Change of Venue.—Judge of Criminal Court.—Where a change of venue has been taken from the judge in a civil cause, and a judge of a criminal court is called, and a jury is waived, and the cause is submitted to the judge for trial by agreement, no question can afterward be raised as to his jurisdiction to try the cause.

Rose v. Allison et al., 276

JURY.

See HABEAS CORPUS, 1; INSTRUCTIONS TO JURY.

Discharge of. See PRACTICE, 18.

JUSTICE OF THE PEACE.

See COSTS, 1, 2; CRIMINAL LAW, 1; SET-OFF, 3.

LANDLORD AND TENANT.

Practice.—New Trial as of Right.—A tenant holding over against his landlord or his grantee is not entitled to a new trial, as a matter of right, in an action commenced before a justice of the peace and on appeal decided in the circuit court in favor of the landlord's possession.

Over v. Moss, 463

LICENSE.

See CITY, 1 to 4.

LIMITATIONS, STATUTE OF.

See STATUTE OF LIMITATIONS.

LIQUOR LAW.

See CITY, 1 to 4.

1. *Sale to Minor.—Burden of Proof.*—Under the statute imposing a fine upon one who sells intoxicating liquor to a minor, a sale to a minor under the belief, entertained by the seller in good faith, that the minor is an adult, is not within the statute, but the burden of proof is on the seller to show in defence such facts as will justify the inference of such *bona fide* belief.

Goetz v. The State, 162

2. *Same.*—That the minor told the seller he was twenty-one years of age, is not sufficient to justify such inference. *Id.*

3. *Same.*—Evidence that such minor had a beard simply, furnishes to the Supreme Court no means of judging as to the apparent age of the minor. *Id.*

MARRIAGE.

See HUSBAND AND WIFE.

MINOR.

See HUSBAND AND WIFE, 9; LIQUOR LAW, 1, 2, 3.

1. *Conveyance.—Married Woman.*—Under section 41 of chapter 28 of Revised Statutes 1843, p. 421, a married woman under the age of eighteen years could not, either with or without the consent of her father or guardian, release or relinquish her dower in the lands of her husband by him sold and conveyed. *Law et al. v. Long et ux.*, 586
2. *Deed of Minor Voidable and Not Void.*—The deed of a minor, conveying his land for a valuable consideration, is voidable, and not void, and the right to avoid it on coming of age is a personal privilege to the minor and his heirs. *Ib.*
3. *Married Woman.—Right of Dower.*—The joinder of a married woman, who is also a minor, in the execution of a deed conveying the lands of her husband, not being void but voidable merely, operates to relinquish her right of dower, subject to her right of election, on arriving at full age, either to affirm or disaffirm her deed. *Ib.*
4. *Disaffirmance of Deed.*—Where the act of an infant is executed, as where a deed is made and delivered, the infant must, on attaining full age, do some act to disaffirm the contract. *Ib.*
5. *Same.—Action for Assignment of Dower.*—Where an infant *feme covert* has joined in a deed with her husband, conveying his real estate, she cannot maintain an action to obtain an assignment of dower in the real estate so conveyed, unless her deed has been disaffirmed in some mode known to the law, before the commencement of the action. *Ib.*
6. *Married Woman.—Action to Avoid Deed.—Tender.*—An action may be brought to avoid a deed made by an infant *feme covert*, without paying or tendering back the purchase-money for the premises in dispute. *Ib.*

MISTAKE.

See PLEADING, 16

MORTGAGE.

See PARTNERSHIP, 1, 2; STATUTE OF LIMITATIONS, 2; TENDER.

1. *Pleading.—Foreclosure.—Description.*—The complaint for a foreclosure of a mortgage should so describe the premises that, if a sale is ordered, the officer may know on what to execute the order. *Struble et ux. v. Neighbert*, 344.
2. *Same.*—The complaint for a foreclosure of a mortgage is fatally defective where, without containing a sufficient description of the premises mortgaged, it refers to the mortgage made a part thereof, which contains no sufficient description, but itself refers therefor to another instrument. *Ib.*
3. *Foreclosure.—Redemption.—Statute.*—L. held a mortgage on certain real estate to secure the payment of four promissory notes, payable in one, two, three, and four years, executed by B. The first note was paid when due, and L. assigned the second to G. When that note became due, G. instituted suit to foreclose the mortgage and collect the note, making L. and certain other junior incumbrancers parties as defendants. L. filed a cross complaint setting up his notes and uniting with G. in the request for the foreclosure of the mortgage. The decree declared the rights of G., L., and other junior incumbrancers. The order of sale was issued at the instance of G., and the property was purchased by him for a sum only sufficient to pay his judgment, and he received the sheriff's certificate. Within the year, L. paid to the clerk the amount of the bid of G., with ten per cent. interest, for the purpose of redeeming. The clerk made the entry showing the redemption, which, however, G. refused to recognize.

Held, in a proceeding instituted by L. to establish and enforce his right to redeem, that L. was entitled to redeem the premises under the statutory provision. *Davis et al. v. Langsdale*, 399

NAME.

See AMENDMENT, 1.

NAVIGABLE RIVER.

See CITY, 5; RIVER.

NEGLIGENCE.

See RAILROAD, 1 to 5, 11 to 14

1. *Buildings in Cities.—Care in Construction of Chimneys, Furnaces, etc.* Action for the destruction by fire of the plaintiff's factory building, caused by sparks from the brewery of defendant. The grounds on which a recovery was claimed were, first, that the flues, chimneys, and furnaces in defendant's brewery, being near to plaintiff's factory building, were not built in proper shape, or of sufficient height or capacity, thereby causing burning coals, soot, cinders, sparks, and embers to be carried therefrom upon the roof of the factory, whereby it was burned and destroyed; and, second, that defendant was negligent in the use of the furnaces, flues, and chimneys, by making large fires therein, of highly inflammable and dangerous material, so that the sparks, embers, etc., passed from the chimney to the roof of the factory, burning and destroying it.

The defendant's brewery was built in a populous part of a large and rapidly increasing city. The property of the plaintiff, which was destroyed by the fire, was there at the time the brewery was constructed.

Held, that this imposed upon the defendant the necessity of exercising a higher degree of care and diligence in the construction and management of his brewery than if it had been located in the country, or in a part of the city where there were no houses in its immediate vicinity; that a mere difference of opinion among men of science and experience, as to the best plan to construct the chimney, furnace, and flues, did not justify the selection of any well supported theory without further inquiry; for the defendant was bound to use all due care and vigilance to ascertain which theory was correct, and which incorrect; and for that purpose he was bound to avail himself of all the discoveries which science and experience had put within his reach; that while the law does not require absolute scientific perfection in the construction of such works, it does require the exercise of a high degree of care and skill to ascertain, as nearly as may be, the best plan for such structures; and it requires that not only skilful and experienced workmen shall be employed in their construction, but that due skill shall be exercised by such workmen in the particular instance; that the defendant was liable in damages to the extent of the injury sustained by the plaintiff, if it was proved upon the trial, either that ordinary care and diligence were not employed in the construction of the chimney, furnaces, and flues, or that he was guilty of negligence in the management thereof, and that the factory building was destroyed from either of these causes.

Gagg et al. v. Vetter et al., 228

2. *Question of Law and Fact.*—The question of negligence is one of mingled law and fact, to be decided as a question of law by the court, when the facts are undisputed or conclusively proved, but not to be withdrawn from the jury when the facts are disputed and the evidence is conflicting. *Id.*
3. *Instruction.*—It was proper for the court, in said action, to admit evidence to prove that smoke, sparks, and flame had been seen coming out of the top of the chimney at other times than on the occasion of the injury complained of, and to instruct the jury that it was proper for them to consider and weigh such evidence, in determining whether the chimney and smoke-stack had been properly constructed. *Id.*

4. *Bill of Exceptions.—Evidence.—Jury Viewing Premises.*—The fact that the jury were conducted by the bailiff to inspect the premises, chimneys, etc., of defendant's brewery did not prevent this court from regarding the bill of exceptions as containing all the evidence. *Ib.*
5. *Pleading.—Railroad.*—A complaint seeking a recovery from a railroad company on the ground of negligence in running a train of cars, whereby the plaintiff has been injured, must expressly allege that the injury occurred without the fault or negligence of the plaintiff, or it must clearly appear from the facts which are alleged that such must have been the case.
Maxfield v. The Cincinnati, Indianapolis, & LaFayette R. R. Co., 264

NEW TRIAL.

See BILL OF EXCEPTIONS, 1, 4; COSTS, 3; PRACTICE, 5, 11, 22; SURPRISE.

As of Right. See LANDLORD AND TENANT.

1. *Motion.—Surprise.—Newly-Discovered Evidence.—Presumption.*—Where a plaintiff's motion for a new trial, on the ground of surprise at the evidence delivered by the defendant, and on the ground of newly-discovered evidence, by which the evidence that operated as a surprise can be disproved, is supported by an affidavit of the plaintiff's attorney, and is overruled, and a continuance to enable the affidavit of the plaintiff to be produced is refused, if the evidence is not in the record, the presumption is in favor of the ruling of the court below.
Talcott et al. v. Jackson et al., 201
2. *Same.—Instructions to Jury.*—A motion for a new trial, on the ground of error in refusing or giving instructions, must specify the instructions alleged to have been given, which were incorrect, and those refused, which should have been given.
Reeves et al. v. Plough, 204
3. *Same.—Evidence.*—A motion for a new trial on the ground of the improper admission of evidence must point out the evidence improperly admitted. *Ib.*
4. *Same.—Demurrer.*—The overruling of a demurrer to a pleading is not a reason for a new trial. *Ib.*
5. *Evidence.*—A motion for a new trial on the ground of the improper admission or exclusion of evidence should specify the evidence claimed to have been improperly admitted or rejected. It should name the document or the testimony, specifying the witness, which was improperly received or disallowed.
Ball v. Balfie et al., 221
6. *Reasons for New Trial.—Indefinite.*—A statement of a reason for a new trial, "that the court misdirected the jury," does not include a refusal to direct the jury as requested; and the statement is too vague and indefinite.
Brooker v. Weber, 426
7. *Same.—Irregularity in the proceedings of the court and of the prevailing party,* by which the defendants were prevented from having a fair trial, and error of law occurring at the trial, as statements of reasons in a motion for a new trial, are too general. The irregularity and the error of law should be pointed out and specified in the motion.
Ward et al. v. Patrick, 438
8. *Same.—Suppressing Deposition.*—Where a motion is made to suppress a deposition, and the court takes the motion under advisement, until after verdict, and then sustains the motion, but on the trial excludes the deposition, and there is a motion for a new trial on the ground of the suppression of the deposition, this cause includes the ruling excluding the deposition as evidence.
Mercer v. Patterson, 440
9. *Reason For New Trial.*—A statement of a reason for a new trial, that the court erred in admitting evidence in behalf of the plaintiff over the defendant's objection, is too general. *The I., B., & W. R. W. Co. v. Beaver*, 493
10. *Same.—Irregularity in the proceedings of the court, and error of law occurring at the trial,* when thus vaguely stated as causes in a motion for a new trial, will not be noticed on appeal.
Ferguson v. Ramsey, 511

11. *Motion.—Evidence.*—Where it is alleged as a cause in a motion for a new trial, that the court erred in admitting evidence against the plaintiff, the particular evidence objected to should be pointed out.
Sparks v. Davis et al., 526
12. *Same.—Demurrer.*—The ruling upon a demurrer is not a ground for a new trial.
Id.

NUISANCE.

See CITY, 5.

OCCUPYING CLAIMANT.

1. *Practice.—Color of Title.*—In an action under the law in regard to occupying claimants, in the absence of a general verdict, it is an essential fact for the jury to find whether the claimant had color of title.
Cain v. Hunt et al., 466
2. *Parties.*—Where land is claimed by several persons, each of whom has put improvements on his own part thereof, *query*, whether all such persons can unite in a proceeding under the law in regard to occupying claimants. *Id.*

OFFICE AND OFFICER.

See COUNTY CLERK, 3, 4; FEE BILL, 1, 2.

OPEN AND CLOSE.

See RAILROAD, 10.

PARENT AND CHILD.

See HABEAS CORPUS, 2 to 5.

PARTIES.

See CONTRACT, 2, 3; OCCUPYING CLAIMANT, 2; PROCEEDING SUPPLEMENTARY TO EXECUTION.

PARTITION.

See HUSBAND AND WIFE, 5.

Practice.—Appeal.—An appeal will not lie from an order of partition and the appointment of commissioners to make such partition, until after the return and confirmation of the report.

Kern, Ex'r, et al. v. Maginniss et al., 398

PARTNERSHIP.

See ATTORNEY, 2.

1. *Right of Widow in Partnership Real Estate.*—Where certain real estate was purchased by partners, with partnership means, for partnership purposes, and was mortgaged to secure the payment of a partnership debt, and was afterward sold on a foreclosure of the mortgage, and purchased by the partnership creditors, leaving a balance of the partnership debt unpaid, the firm and its members being insolvent;
Held, in a suit for partition by the widow of one of the partners, who had died after said sale, that she was not the owner of any portion of the premises, though she did not join in executing the mortgage, and was not made a party to the suit for foreclosure.
Huston et al. v. Neil, 504
2. *Same.*—Where real estate is held as partnership property, the separate interest of each partner is his share of the surplus remaining after the payment of the debts of the firm and the final accounting between the partners. If there is no surplus, there is no real estate of which the individual partners

can be seized; and in such case, the wife of a partner is not a necessary party to a suit for the foreclosure of a mortgage made by the partners to secure a partnership debt. *Id.*

PAYMENT.

See PLEADING, 5; PLEDGE, 1

1. Payment may be made in anything that the creditor will receive as payment. *Hart v. Crawford, Ex'r*, 197
2. *Promissory Note.—Payment to Third Person.*—In a suit by the payee of a promissory note against the maker, an answer alleging payment to a third person, without showing any authority in such person to receive such payment, is bad on demurrer. *Maynard et al. v. Black*, 310
3. *Mistake of Law.—Voluntary Payment.—Necessity.—Duress.*—It is well settled by the current of authority, that where money is paid with a full knowledge of all the facts and circumstances upon which it is demanded, or with the means of such knowledge, it cannot be recovered back upon the ground that the party supposed he was bound in law to pay it, when in truth he was not. Nor can money voluntarily paid upon demand, though the demand be unjust, be recovered back where the party paying has full knowledge of all the facts. But if there be a controlling necessity in the case, arising from the peculiar circumstances under which the money is demanded, the rule does not apply. This controlling necessity may arise from duress as applied to the property, as well as to the person, and where one person is in possession of the goods or property of another, and refuses to deliver the same up to that other, unless the latter pays him a sum of money which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment by compulsion, and may be recovered back. So, if the property be not actually in the possession of a person, but he has such control over it as to give him an undue advantage over another, and money is therefore paid to remove such control, or if thereupon it is agreed between the parties that if the money is so paid, it shall not be regarded as a voluntary payment and may be recovered back if the party paying is otherwise entitled to recover, such recovery may be had. *The L. & I. R. R. Co. et al. v. Pattison*, 312
4. *Freight in Excess of Contract Paid Under Protest.—Recovery of Excess.* During the rebellion, A. had a contract to furnish the government with a certain number of beef cattle within two months, and for the purpose of filling such contract went to Chicago and made a contract with a railroad company to ship cattle for him to Indianapolis at sixty-five dollars per car; and, leaving an agent to ship, he returned to Indianapolis to receive the cattle. The cattle of the first shipment of two car loads were sent to the cattle yard of A., and after a few days a bill for two hundred and one dollars and two cents was sent to A., which he refused to pay, and he informed the agent of the railroad company that he had a contract for the shipment at sixty-five dollars per car; the agent denied knowledge of any such contract, and insisted that the bills must be paid as presented, and that he would not deliver any future car loads of cattle until the freight was paid, as he made it up from the way-bills, and that the bill included other things besides freight, which he could not itemize. It was agreed that A. should pay under protest, and also future freight, and the cattle should be delivered as they arrived, and A. should reserve the right to recover any sum so received unjustly. In pursuance of this agreement, the agent delivered the cattle at the yard of A. as they arrived from time to time, and as soon as the bills were prepared they were paid by A.
Held, that the payments were not voluntary, and that A. could recover all sums so paid in excess of his contract price. *Id.*

PLEADING.

See AMENDMENT; APPEAL BOND, 1, 2; DEMURRER; INJUNCTION, 1; MORTGAGE, 1, 2; NEGLIGENCE, 5; PAYMENT, 2; PROMISSORY NOTE, 5; RAILROAD, 1, 2, 5; SET-OFF, 5; STATUTE OF LIMITATIONS, 1, 2; TURNPIKE, 3, 6 to 9.

1. *Damages, Mitigation of.*—Where matter may be given in evidence by a defendant, on the assessment of damages, in mitigation thereof, no pleading setting up such matter is needed, and therefore the sustaining of a demurrer to such a paragraph is harmless. *Catlett v. Gilbert*, 23 Ind. 614, criticised.

Allis et al. v. Nanson et al., 154

2. *Contract.*—In an action by the seller for damages for a breach of a contract for the purchase of a certain number of hogs at a specified price, of a minimum weight, at a fixed time and place, where the complaint alleged that the plaintiff had the hogs at the place and time fixed, ready for delivery, and the defendant failed and refused to receive and pay for them;

Held, after verdict and judgment for the plaintiff, that it was not necessary to further aver that the hogs were weighed and set apart for the defendant.

Dawson v. Byard, 165

3. *Promissory Note.—Assignee.—Set-Off.—Counter-Claim.—Reply.*—In a suit brought by the assignee of a promissory note against the maker, if the maker answer by way of set-off or counter-claim against the payee, the assignee may reply, setting up a claim of the payee against the maker, and thereby show that there is in fact no defence to the note.

Dodge et al. v. Dunham, 186

4. *Same.—Set-Off.—Principal and Surety.*—Where one of several makers of a promissory note files a set-off in his favor, he should allege that he is principal and that the other makers are only sureties; and in the absence of such allegations, it is not error to refuse to allow the set-off. *Id.*

5. *Answer.—Payment.—Accord and Satisfaction.*—To a complaint by an executor upon a due-bill, the defendant answered that he had paid the deceased the full amount of principal and interest due, "and the sum of money was paid in goods, wares, and merchandise, and was paid in full satisfaction of said note, and was so received by the deceased in his lifetime."

Held, that the answer was good, and in form a plea of payment.

Held, also, that it was substantially a good answer of accord and satisfaction.

Hart v. Crawford, Ex'r, 197

6. *Certainty.*—Want of certainty in a pleading is not good ground of demurrer. *Id.*

7. *Review of Judgment.—Complaint.—Record.*—A complaint to review a judgment must be accompanied by a full record of the proceedings sought to be reviewed. *Davis v. Perry et al.*, 305

8. *Indefiniteness.*—The statement, in a pleading, of the amount of an indebtedness as "a large sum of money" is too vague and indefinite.

Brookbank et ux. v. Kennard et al., 339

9. *Written Instrument.—Judgment.*—A judgment is not a written instrument within the meaning of the statute requiring copies of written instruments in pleading. *Brooks v. Harris*, 390

10. *Same.—Copy of Written Contract.—Demurrer to Reply to Bad Answer.* Suit on a promissory note, secured by a chattel mortgage upon a portable saw-mill. Answer that the note was given in consideration of the sale of the portable saw-mill, which sale was made upon a written agreement, executed by the plaintiff to the defendant, warranting the mill to be in good and complete running order; that there was a breach of said warranty, etc. There was no copy of the written contract filed with the answer. To this there was a reply, that the written contract was simply preliminary to an examination of the mill by the defendant, and that such examination had been made, and the note thereupon executed, and the written contract surrendered up. A demurrer to this reply was overruled.

Held, that the reply was good, and that if bad the demurrer should have been sustained to the answer for the failure to file therewith a copy of the written agreement.
Drook v. Irvine, 430

11. *Reply.—Failure to Reply.*—Where there are separate paragraphs of an answer filed by different defendants, a reply in these words: "The plaintiff for reply to defendant's answer, says that he denies each and every allegation to the answer," may be taken to be a reply to each paragraph of the answer. At all events, a defendant going to trial without objection waives a reply to his answer, and the same will be regarded as controverted.

Ferguson et al. v. Wagner, 450

12. *Exhibit.*—When a pleading is founded upon a written instrument, a copy of which is filed with the pleading and referred to therein, it becomes a part thereof, and its contents need not be stated. *Mercer v. Herbert*, 459

13. *Sale of Stock.—Future Value.*—In a suit upon a promissory note, it substantially appeared, from the answer, with an instrument referred to therein by copy, that the defendant sold to the plaintiff certain shares of bank stock at their nominal value, to which was to be added the difference between the par value and the actual value thereof at a specified date; and that the amount was to be applied on the note. If the parties should agree on the value, it was to be binding on them; if not, a method was fixed for determining the value. The value of the stock at said specified date was alleged in the answer, and the failure to credit the same on the note as agreed.

Held, that the answer was good on demurrer.

Id.

14. *Demurrer.*—A demurrer to several paragraphs of a pleading, mentioned by number, is a several demurrer to each paragraph.

Cain v. Hunt et al., 466

15. *Same.—Evidence.*—It is not error to sustain a demurrer to an answer which sets up material matter admissible as evidence under a general denial pleaded.

Id.

16. *Misdescription in deed.*—To support title to land, deeds misdescribing the land and extrinsic evidence to prove such misdescription to have been made by mistake, are inadmissible, when the ground therefor has not been laid in pleading by allegation of the mistake and prayer for reformation of the instrument.

Id.

17. *Complaint.*—A complaint which charged that the defendant, as the agent of the plaintiff, had sold certain real estate and received the money therefor and failed to account, and also charged him with a balance due for personal property sold to him, was held good on demurrer for want of sufficient facts.

Ferguson v. Ramsey, 511

18. *Answer.—Statute of Frauds.—Answer in Full.*—An answer to this complaint, that as to the sale of the land, it was a charge of the plaintiff against the defendant upon a contract for the sale of land, and that the contract was not in writing, was not a good defence. The complaint was not upon a contract for the sale of land to the defendant. Nor did the paragraph answer the entire complaint.

Id.

19. *General Denial.—Paragraph Stricken Out.*—A paragraph alleging that the land was, at the time of the sale, the property of the defendant, was properly stricken out, the general denial being also pleaded in answer.

Id.

20. *Statute of Limitations.—Part Payment.*—To an answer of the statute of limitations, a reply that the defendant, within six years, paid on the claim mentioned fifty-one dollars as a part payment, was sufficient.

Id.

PLEDGE.

1. *Payment.*—The mere delivery of choses in action as collateral security for a debt cannot be pleaded as a payment of the debt.

Reeves et al. v. Plough, 204

2. *Diligence to Collect Collaterals.*—The holder of such collaterals is answerable for reasonable, but not extraordinary, diligence in their collection. *Id.*
3. *Same.*—If collaterals are lost for want of reasonable diligence, the creditor holding them must account for the amount, but such loss cannot be presumed from the mere fact of their remaining uncollected. *Id.*
4. *Same.*—If collaterals are held to secure the payment of a note, and, before judgment on the note, there has been payment of the collaterals, or such want of diligence in collecting the same as to make the holder responsible for the amount of them, this will constitute a defence to an action on the note, but it cannot be set up afterward as a payment of the judgment on the note. *Id.*
5. *Rights of Pledgee.*—A person cannot be deprived of the benefit of collaterals or their proceeds, deposited to secure indebtedness to him, except upon a discharge of the indebtedness. *O'Brien et al. v. Flanders, 486*

POOR PERSON.

See CRIMINAL LAW, 5.

PRACTICE.

See AMENDMENT; APPEAL; ATTORNEY; BILL OF EXCEPTIONS; CONTEMPT; CONTRACT, 2, 3; COSTS; CRIMINAL LAW, 4 to 7; DECEDENTS' ESTATES, 7; DEMURRER; INSTRUCTIONS TO JURY; INTERROGATORIES TO JURY; JURISDICTION; NEGLIGENCE, 4; NEW TRIAL; PARTITION; PRINCIPAL AND SURETY, 1, 2, 3; PROCEEDING SUPPLEMENTARY TO EXECUTION; RAILROAD, 2 to 5; SET-OFF, 5; SUPREME COURT; SURPRISE.

1. *Agreed Statement of Facts in Part, and Finding of Jury in Part.—Conclusion of Finding.*—Where there is an agreed statement of facts as to part of the matters in controversy, and the disputed matters of fact are by agreement submitted to a jury to find specially, and the evidence is not in the record, but only the agreed statement, and the finding of the jury upon the disputed facts, the finding will be, upon appeal, as conclusive upon the parties as though the facts found were agreed upon. *Nichols v. Glover, 24*
2. *Rules of Court.—Security for Costs.—New Corporation Succeeding Old Liabilities.—Statute of Limitations.*—Where a rule of court requires "an application for security for costs to be made before answering to the complaint, unless answer is made in ignorance of the non-residence, or the plaintiff has become a non-resident since answering," an application on an affidavit which does not disclose the existence of either exception is properly overruled, when the application is first made after the cause has been once tried. Such a rule of court is not repugnant to the laws of this State, unjust, or unreasonable, and is therefore valid. Where a new trial has been granted, and a new corporation, having succeeded to the rights and liabilities of an old one, is substituted as defendant, the rule will apply to the new corporation, and prevent it from making such application, on the re-trial of the cause, although new issues have been formed. The new corporation is liable as the old, and can make no defence that the old one could not make. If the statute of limitations could not bar the action for the old corporation, it cannot avail the new company.
The F., M., & I. R. R. Co. v. Hendricks, Adm'r, 48
3. *Amendment.—Motion to Strike Out.*—Where an amendment to a complaint is made, the question whether the amendment makes a new cause of action, which is barred by the statute of limitations, cannot be raised by motion to strike out the amendment. *Id.*
4. *Identical Paragraphs.—Motion to Strike Out.—Harmless Error.*—If two paragraphs of a complaint are identical, it is a harmless error for the court to refuse to strike out one of the paragraphs on motion, for that reason. *Id.*
5. *Relief from Judgment.—Fraud.—Newly-Discovered Evidence.—Ex parte*

Affidavits.—There are three proceedings which may partially involve the facts in the case, to which a party may resort after judgment has been rendered against him in the same court.

First. Any one who is a party to a judgment, or the heirs, devisees, or personal representatives of a deceased party, may file, in the court where such judgment was rendered, a complaint for a review of the proceedings and judgment at any time within three years next after the rendition thereof. Any one under legal disabilities may file such complaint at any time within three years after the disability is removed. A divorce is excepted from this provision. The complaint may be filed for any error of law appearing in the proceedings and judgment, or for material new matter discovered since the rendition thereof, or for both causes, without leave of court. In this proceeding the parties have the right to form issues of law and fact, and try these issues, as in other cases. "New matter" means something more than newly-discovered evidence, which alone will not sustain a complaint to review a judgment.

Second. Another method of relief from a judgment, and one more frequently resorted to, is an application for a new trial. This is usually made during the term at which judgment is taken. Where, however, the cause is discovered subsequent to that term, a complaint may be filed, not later than the second term after the discovery, on which a summons issues for the next term, and the case is decided summarily on the evidence, but the application must be made within one year after final judgment.

Third. Section 99 of the code provides, that the court shall relieve a party from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, within two years. Where issues of fact have been formed and tried by a jury, and there has been a finding for the plaintiff, and a motion for a new trial has been overruled, and final judgment has been rendered, which on appeal to the Supreme Court is affirmed, the 99th section does not authorize the court to set aside the judgment upon *ex parte* affidavits of the discovery of new evidence relating to the issues which were disposed of in the former trial. The section was not intended to authorize relief from a judgment based upon a verdict which was the result of a trial in a case where issues had been formed and both parties appeared, and the only ground for relief is newly-discovered evidence relating to the issues which were so tried. It applies to cases where, through the mistake, inadvertence, surprise, or excusable neglect of the party, the merits of the case have not been put in issue, tried, and decided. If it be admitted that courts in this country have the equity power recognized in English jurisprudence to give relief from a judgment obtained by fraud, still this cannot be done upon a mere *ex parte* showing.

Webster v. Maiden, 124

6. *Demurrer.*—*Several Plaintiffs.*—If two or more persons unite in an action, a cause of action must be stated in favor of all of them, or a demurrer for want of sufficient facts will be sustained. *Fatman et al. v. Leet et al., 133*

7. *Judgment.*—*Change of Venue.*—On change of venue, one court sent a cause to another, which improperly struck it from the docket, with costs against the plaintiff, remanding the cause to the former court; and thereupon the former court tried the cause, and upon appeal the Supreme Court reversed the judgment and ordered the cause back to the court to which the venue had been changed, for trial;

Held, that under said reversal and order, the said judgment for costs against the plaintiff was reversed, and a motion to tax said costs against him by reason of said judgment was correctly overruled.

Held, also, that a demurrer to an answer setting up said judgment striking the cause from the docket and for costs against plaintiff was correctly sustained.

Hamrick v. The Danville, etc., Co., 170

8. *Bill of Exceptions.*—*Motion to Dismiss.*—To present any question on a motion to dismiss an appeal from a precept issued for the collection of an assessment for a street improvement, it must be properly reserved by a bill of exceptions.

Lammers v. Balfe et al., 218

9. *Motion for Judgment.*—To present any question on the refusal of a court to render judgment on the sustaining of a demurrer to the complaint, on such appeal, the record must show a request for such judgment, and an exception to the refusal of the court to render the same. *Id.*
10. *Amendment.*—Where the record does not show an objection to the filing of an amendment to a complaint, and the proper exception to the ruling thereon, no question as to the filing of the amendment is reserved for review. *Id.*
11. *Finding of Facts and Conclusions of Law.—Motion for New Trial.—Exception to Conclusions of Law.—Assignment of Error.*—Where a cause is submitted to the court for trial, and the court is requested by one of the parties to find the facts, and then the conclusions of law upon them, two things are to be done. 1. The court must state the facts, which of necessity involves the finding of the facts. 2. The court must state the conclusions of Law upon the facts.

If in finding the facts the court has erred, a motion for a new trial is the proper remedy, and the assignment on appeal of the overruling of such motion presents all questions properly set forth in the motion. If the court has erred in the conclusions of law, the error is reached by excepting to the conclusions of law and assigning the error on the record on appeal. A motion for a new trial on the ground of error in the conclusions of law and the assignment of the overruling of the motion as error on appeal will present no question to the Supreme Court.

The Montmorency Gravel Road Co. v. Rock, 263

12. *Same.*—To present a question for review under section 341 of the code, four things must concur: 1. One of the parties must request the court to find the facts specially, with a view of excepting to the decision of the court upon the questions of law involved in the trial. 2. The court must state the facts in writing. 3. The conclusions of the court upon the questions of law arising upon the facts found must be stated, and judgment must be entered accordingly. 4. There must be an exception to the decision of the court. *Cruzan v. Smith et al.*, 288
13. *Same.—Exception.*—When a party excepts to the decision of a court on a special finding of facts and conclusions of law thereon, he admits that the facts are fully and correctly found, but says that the court has erred in applying the law to the facts found to exist. When a case is thus prepared, the only question presented for decision is, whether the court erred in applying the law to the facts found. This question is presented for review by assigning for error, that the court erred in its conclusions of law. *Id.*
14. *Same.*—The failure of a party to except to the decision of the court is not remedied by a motion for a judgment on the special finding, or for a new trial on the ground that the court has erred in its conclusions of law upon the special finding. Nor is any question presented for review by excepting to the finding of the court. *Id.*
15. *Same.—Appeal.*—An attempt and failure of a party to perfect an appeal under section 341 of the code will not deprive him of the right of perfecting his appeal under section 352 of the code, where all the facts have not been correctly found, or where the facts found do not cover all the issues in the cause. In such case, the party must move for a new trial for the reasons assigned in the sixth clause of section 352, and put the evidence in the record by a bill of exceptions. *Id.*
16. *Exception.*—An exception is an objection taken to the decision of a court upon a matter of law. *Id.*
17. *Striking Out.*—There is no error in striking out one paragraph of an answer, where the evidence admissible under such paragraph can be introduced under a remaining paragraph of such answer. *Maynard et al. v. Black*, 310
18. *Discharge of Jury.*—A discharge by the court of a jury, because one member thereof is unable to attend, although both parties desire to proceed

with the remaining eleven jurors, does not work a discontinuance of the case, or render invalid a trial at a subsequent term. *Id.*

19. *Instructions to Jury*.—It is error for the court to charge that the plaintiff is entitled to recover unless the defendant has proved the allegations in two independent and sufficient paragraphs of the answer. *Id.*

20. *Bond of Indemnity*.—The statute does not authorize the court to require a bond of indemnity to be given by a plaintiff, as assignee of a deposit in a bank, where no certificate of deposit has been given, and the depositor cannot be found, and publication has been made of notice to the depositor made a co-defendant with the bank to answer as to his interest.

Query.—Is this a proper case for publication?

Swingle v. The Bank of the State, 423

21. *Instructions*.—It is error for the court to instruct the jury, as a matter of law, as to what the evidence given proves. *Cain v. Hunt et al.*, 466

22. *Reason for New Trial*.—*Motion for Judgment on Special Finding*.—The inconsistency of a special finding with the general verdict is not a reason for a new trial. The question is presented by a motion for judgment on the special finding. *Grand Rapids, etc., R. R. Co. v. Horn et al.*, 479

23. *Affidavit for Continuance*.—*Time to Prepare Affidavit*.—A party is not entitled, as a matter of right, to time to prepare an affidavit for continuance. Unless a reason be shown for claiming such time for preparation, the action of the court in refusing it will be affirmed. *Ferguson v. Ramsey*, 511

PRINCIPAL AND AGENT.

See AMENDMENT, 2; PLEADING, 17 to 20.

1. *Agent*.—*General*.—*Special*.—*Limitation of Authority*.—*Notice*.—Where a firm commissioned S. to purchase, not a particular lot or quantity of tobacco merely, but to purchase generally Kentucky tobacco, of the crop grown in the year 1866, at Oak Lawn and vicinity, on their account and for their benefit, and to receive the same, have it assorted, etc., prized, and put into hogsheads and placed on the bank of the river, ready for shipment, and the agreement between the firm and said agent stipulated that he should purchase only for cash, and should not give the firm signature to any obligation; *Held*, that where the agent did purchase on credit, and gave the receipt of the firm, and it did not appear that the seller had any notice of the want of authority in the agent to purchase on credit, the firm would be liable, although they had settled with the agent, supposing he had obeyed his instructions, and paid for the tobacco with money furnished by them for that purpose. The authority to purchase, unless restricted, carried with it the authority to purchase on time and on the credit of the principals. The firm, by making S. their agent to purchase, and not making known the terms upon which he was to purchase, justified those dealing with him in believing he was authorized to purchase on credit. The fact that this restriction on their agent to purchase for cash only, was known in the neighborhood, unless brought to the knowledge of the seller, would not avail the firm.

Fatman et al. v. Leet et al., 133

2. *General Agent*.—A general agent is one who is authorized to transact all the business of his principal, or all his business of some particular kind, or at some particular place. *Crusan v. Smith et al.*, 288

3. *Same*.—The principal is bound by the acts of a general agent, if the latter has acted within the usual and ordinary scope of the business in which he was employed, notwithstanding he may have violated the private instructions which the principal may have given him; provided the person dealing with such agent was ignorant of such violation and of the fact that the agent exceeded his authority. *Id.*

4. *Same*.—The fact that the authority of an agent is limited to a particular business does not make his agency special; it may be general in regard to that business, as though its range were unlimited. *Id.*

5. *Special Agent*.—A special agent is one who is authorized to do one or more specified acts, in pursuance of particular instructions, or within restrictions necessarily implied from the act to be done. *Id.*
6. *Same*.—The principal is not bound by the acts of a special agent, if he exceeds the limits of his authority. And it is the duty of every person who deals with a special agent to ascertain the extent of the agent's authority, before dealing with him. If this be neglected, such person will deal at his peril, and the principal will not be bound by an act which exceeds the particular authority given. *Id.*
7. *Liability of Principal*.—If a principal puts his agent in a condition to impose upon innocent third persons by apparently pursuing his authority, the principal will be bound by his acts, and he must lose in preference to such third persons. *Id.*
8. *Same*.—If one who is the general agent of another in the purchase of wheat, as such agent, buys wheat to be paid for on demand at the current price at the time of demand, his principal will be liable, though the principal may have instructed his agent to buy only for cash, and though the principal may have paid the agent for the wheat, if the contract be made in good faith, upon the credit of the principal, and without any knowledge of the private instructions of the principal. *Id.*

PRINCIPAL AND SURETY.

See PLEADING, 4; SET-OFF, 2.

1. *Statute Construed*.—The statute, sec. 674, 2 G. & H. 308, in reference to sureties, contemplates a written complaint by the surety, in the nature of a cross complaint against the principal, and pleadings, issue, and trial thereon, the same as upon any other cross complaint; but these proceedings should not affect the proceedings of the plaintiff. *Dodge et al. v. Dunham, 186*
2. *Practice*.—*Motion for New Trial*.—Though not in the form of a cross complaint, if the surety sets up that he is only surety, and his co-defendant goes to trial without objection, and submits the issue to a jury, and does not afterward raise objection to the form or manner of making the issue of suretyship, but joins in asking for a new trial, because the jury has not found upon that issue, the motion should be sustained as between the defendants. *Id.*
3. *Same*.—Issues joined between defendants upon a question of suretyship may be tried at, before, or after, the trial of the cause, or even at a subsequent term. *Id.*

PRISON DIRECTOR.

See ELECTION.

PROCEEDING SUPPLEMENTARY TO EXECUTION.

Parties.—*Residence*.—Where in a proceeding supplementary to execution, the defendant resided in the county where the judgment was obtained and the supplementary proceeding was had;

Held, that a national bank situated in another county might be made a party and required to answer as to funds of the defendant held by it, under section 33 of the code. *O'Brien et al. v. Flanders, 486*

PROCESS.

See AMENDMENT, 1; DECEDENTS' ESTATES, 2; PRACTICE, 20.

PROMISSORY NOTE.

See PLEADING, 3, 4.

1. *Assignee*.—*Vendor's Lien*.—*Non-Resident*.—The assignee of a promissory note given to the assignor for purchase-money of real estate, and for the pay-

ment of which a vendor's lien exists, which is transferred to the assignee by the transfer of the note, and of which lien the assignee has full knowledge, is not bound to resort to the enforcement of the vendor's lien, before he can maintain suit against the assignor, the maker being a non-resident.

Sayre et al. v. McEwen, 109

2. *Same.—Attachment.—Non-Resident.*—An assignee of a promissory note, it was held, was not bound, before bringing suit against an indorser, to proceed by attachment against the property of the maker of the note, who was a non-resident at the time of the making and at the time of maturity of the note, although such assignee knew that the maker had property in this State subject to attachment. *Id.*
3. *Blank.*—The execution of a note, on its face payable at a bank, the place for the name of which is left blank, at a town named, authorizes the payee, before the maturity of the note, to insert the name of a particular bank at such town in the blank space, so that, whatever limitation of authority may have been imposed by the maker on the payee, the note will be negotiable and governed by the law merchant in the hands of a *bona fide* indorsee. *Gillaspie v. Kelley*, 158
4. *Special Demand.*—When a note is payable on demand, a special demand for payment need not be averred in an action thereon. *Mercer v. Patterson*, 440
5. *Attorney's Fees.—Complaint.*—Where suit was brought upon a promissory note, which contained an agreement to pay a reasonable fee for the plaintiff's attorney if the note should be collected by suit, it was held not to be a sufficient cause for reversing a judgment which included an allowance for such fee, that the complaint did not state the amount of the fee claimed. *Roberts et al. v. Comer*, 475

RAILROAD.

See NEGLIGENCE, 5; PRACTICE, 2.

1. *Causing Death of Passenger.—Fault of Passenger.—Negligence of Railroad Company.*—In an action by an administrator against a railroad company for causing the death of his intestate, a paragraph of the complaint, which alleged that the injury was caused by "defendant not having stopped the motion of the cars a sufficient length of time to allow the deceased to safely and securely leave the cars, but having so far checked the motion thereof that she could safely leave the same, suddenly started the train again, while she was in the act of leaving, without giving her a reasonable time to get off, and without want of ordinary care on her part she was thrown violently from the train of cars, and the platform of the depot was so negligently constructed that the foot of said deceased was caught in a hole thereof and she was run over by the said train," etc., was not liable to the objection, that it did not show that the deceased was free from negligence but did affirmatively show that she was guilty of contributing to the injury received. The allegation that the injury occurred "without want of ordinary care on the part of the decedent," was equivalent to an averment that the injury occurred "without the fault or negligence of the plaintiff." The additional averment was made, "that the defendant was not present in person or by her servants or agents to assist the deceased from the cars." These averments of the paragraph showed that the deceased was without fault in attempting to leave the train. She had a right to expect the cars to remain stationary long enough for her to step from the train, and to expect the servants of the defendant to be present to assist her. *The J., M., & I. R. R. Co. v. Hendricks, Adm'r*, 48
2. *Same.—Amendment.—New Cause of Action.—Statute of Limitations.* Where a cause of action by an administrator against a railroad company, as stated in the complaint, was the death of the plaintiff's intestate, caused by the wrongful act or omission of the company, without the fault of the deceased, the particular means or manner of her death not being stated,

on a demurrer's being sustained to the complaint, because it did not appear that the injury producing death was not caused by the contributing fault of the deceased, it was not stating a new cause of action, liable to objection as not being brought within the time limited by the statute, to amend the complaint so as to allege the facts of the accident more particularly. It would be a new cause of action, if the amendment contained a recital of facts connected with some other and different accident and date. The cause of action was the wrongful act of the company and the question of fact was what the wrongful act consisted of. *Id.*

3. *Same.—Statute.—Non-Residents.—Constitutional Law.*—Section 784, 2 G. & H. 330, was intended to provide a remedy, not only for the resident citizens of this State, but for the citizens of the several states while passing through or residing within this State. Section 2, article 4, of the constitution of the United States, would secure the benefit of this section to citizens of other states, if refused by our law. *Id.*

4. *Same.—Foreign Administrator.—Action by.—Trust for Benefit of Widow and Children.*—A foreign administrator can maintain an action in this State against a defendant for having wrongfully caused the death of a person. The administrator will hold the money recovered in trust for the benefit of the widow and children of the deceased. OSBORN, J., dissented from the conclusion that a foreign administrator may bring the suit. *Id.*

5. *Same.—Widow and Children.—Averment in Complaint.*—It is sufficient to allege in the complaint and prove on the trial, that there are persons who are entitled under the statute to the damages. It is not necessary to name the persons or to amend the complaint so as to state the fact, in the event of the death of any of those persons, leaving heirs, after suit brought. *Id.*

6. *Injury to Animals.*—To render a railroad company liable, under the statute, for animals killed or injured by its cars, locomotives, or other carriages, there must be actual collision of the cars, locomotives, or other carriages with such animals. *The O. & M. R. W. v. Cole*, 331

7. *Same.*—A railroad company is not liable, under the statute, for an injury to an animal, where a train caused the animal to take fright, and the injury was the result of the fright. Thus, the company was not liable, where a colt frightened by a train, ran from an adjoining field upon the railroad track, which was not properly fenced, and there broke its leg between the bars of a cow-pit. *Id.*

8. *Appropriation of Land.—Damages.*—Where a railroad sought to appropriate land for the line of its road, the court refused to give this charge to the jury: "That the plaintiff is entitled to recover in damages only the actual damage suffered by the plaintiff in consequence of the appropriation of the land by the defendant, the railroad company, for the right of way, and such injuries as directly result from such appropriation."

Held, that the charge was properly refused, as it did not include any allowance by the jury for the fencing made necessary, and for the overflowing of other parts of the land caused by the embankments, and for the throwing of earth upon the land, and for excavations for earth made outside of the strip appropriated; there being evidence on these matters. The proper elements to be considered in estimating the damages are stated in a charge set out in the opinion. *Grand Rapids, etc., R. R. Co. v. Horn et al.*, 479

9. *Same.—Benefit Set Off Against Special Damage.*—The court also refused to charge as follows: "If you should find from the evidence that by the construction of culverts and drains through and along the road embankments over the plaintiff's land, the defendant (the railroad company) has, in this way, to some extent, drained the plaintiff's land, or rendered its drainage more easy and less expensive, such benefit, if any, may be considered in estimating the plaintiff's damage."

Held, that the charge was properly refused, as the benefit was not limited to meet the damage resulting from the overflow of water caused by the fills and embankments made by the railroad company. *Id.*

10. *Same.—Open and Close.*—Where the only question submitted to the jury was the amount of damages, the opening and close of the case was properly given to the party claiming the damages. *Ib.*
11. *Freight Train.—Passenger.*—Where a person was travelling on a railroad, in a caboose car, in charge of his stock and furniture, and an entry in reference to him had been made on the way-bill by the assistant superintendent, thus: "a man in charge," he was a passenger, and was entitled to all the rights and remedies of a passenger, though perhaps not entitled to the use by the company of all the appliances for the safety of passengers that would be used on passenger trains. But in whatever class of cars a railroad company undertakes to convey its passengers, its duty is to so manage such train that passengers shall not by its own carelessness be killed or injured.
The Indianapolis, etc., R. W. Co. v. Beaver, 493
12. *Same.—Duty of Company.*—Where a railroad company carries for hire, in a caboose car on a freight train, all passengers that apply, it becomes to some extent a passenger train, and the company is bound to use such safeguards for the protection of its passengers as science and skill have devised, and such as experience has proved to be efficacious in accomplishing their object on such a train. Slight care is not sufficient. It is bound to employ all the means reasonably in its power to prevent accidents and protect passengers. *Ib.*
13. *Instruction to Jury.—Public Policy.*—In an action against a railroad company for an injury to the plaintiff while a passenger, resulting from the negligence of the defendant, an instruction, that public policy demands that the law should be applied as rigidly to railroad companies as to any other species of common carriers, is not calculated to mislead the jury. *Ib.*
14. *Evidence.—Negligence.—Instructions.*—In such an action, the court instructed the jury, that the plaintiff was not bound to prove more than enough to raise a presumption of negligence on the part of the defendant and resulting injury to himself; and the court also instructed that it was incumbent on the plaintiff to show to the satisfaction of the jury, by a preponderance of the evidence, some carelessness or neglect on the part of the railroad company, which resulted in the injury of the plaintiff; that if the injury was the result of an accident which ordinary prudence could not have prevented, the defendant was not liable to the plaintiff for anything.
Held, that if there was any error in these instructions, it was fully corrected by one given at the instance of the defendant, that the railroad company was only bound to exercise ordinary prudence to prevent the injury; and that if the jury believed from the evidence that the defendant was not guilty of negligence, the plaintiff could not recover; and that negligence consisted in not doing those things which a reasonable man in managing his own property would have done, under the circumstances shown in the evidence, or in doing those things which a reasonable man would not have done in managing his own property, under the circumstances shown in the evidence. *Ib.*
15. *Donation.—Vote by County.—Aid to Two Roads.*—A vote taken upon a proposition to appropriate an entire sum to be apportioned between two railroads, to aid in their construction, by a county, is illegal, and the collection of the taxes levied in accordance therewith may be enjoined.
Bronenberg et al. v. Board of Comm'rs of Madison Co. et al., 502

RECORD.

See DEMURRER, 2, 3.

Transcript. See COUNTY CLERK, 3; SUPREME COURT, 18, 19, 20; HEATON v. BUTLER, 143; SANDUSKY v. WEBB, 478; KERCHAVAL v. THE STATE, 478.

1. *Appeal.—Complaint.*—The fact that, on an appeal, no complaint appears in the record, but the clerk certifies that "no complaint appears on file," is not a cause for the reversal of the judgment. *Bonsell v. Bonsell*, 476

2. *Supplemental Record*.—A failure in the record to show notice to the defendant, either by summons or publication, may be supplied by a supplemental record containing such proof. 16.

REDEMPTION.

See MORTGAGE, 3.

REPEAL OF LAWS.

- Repeal by Implication*.—The law does not favor the repeal of statutes by implication, and when courts hold that a statute or any provision thereof is repealed by implication, it is done in obedience to the legislative will as manifested in the act. It must appear that the subsequent statute revised the whole subject-matter of the former one, and was evidently intended as a substitute for it, or that it was repugnant to the old law.

The Water Works Co. of Indianapolis et al. v. Burkhart et al., 364

RIPARIAN OWNER.

See RIVER.

RIVER.

Navigable River.—*Riparian Proprietor*.—*Wharf-Boat*.—*Steamboat*.—The Ohio river being a "common highway," the owner of the soil along its banks, although his title may extend to low-water mark, cannot so construct his wharf as to materially interfere with the navigation of the river. His title to the soil of the shore, or under the water, does not authorize him to obstruct, in any way, the free use of the river by the public as a highway.

Every citizen has the right to use it as such, in all its parts not occupied for the time being by others in its navigation. This right to navigate includes the right to stop when the purposes of such navigation require it, for a reasonable length of time, to ship and discharge freight and passengers.

The navigation of public rivers is governed by the same principle that is applied to other common highways. Thus, if one in navigating the river and in landing at a wharf with his steamboat should lap over an adjoining wharf-boat, without touching the wharf-boat, it would not be a trespass, and he would not be liable for damages occasioned by his boat's preventing other boats from landing at the wharf-boat, or even if his boat injured the wharf-boat, if there was no want of skill or care on his part.

Any one navigating the river has the right to land at such wharf as suits his convenience, and if in doing so the current of the river, or other circumstance, carries the stern of his boat down stream so that a portion of his boat's length lies in front of an adjoining wharf, but still in the navigable water of the river, he is but in the exercise of a legal right, and cannot be responsible for any consequential damages which may be sustained by other boats' being thereby prevented from landing at the wharf he may overlap; provided, that in thus exercising his right, he use due skill, care, and dispatch, and subject others to as little inconvenience as is possible, consistently with the exercise of his own rights. *Bainbridge v. Sherlock*, 29 Ind. 364, modified.

DOWNNEY, J., dissented, on the ground that the opinion unnecessarily and improperly subordinated the rights of the riparian proprietor to the mere convenience of the navigator. *Sherlock et al. v. Bainbridge*, 35

RULE OF COURT.

See PRACTICE, 2.

SALE.

See CONSTABLE, 1, 2; GUARDIAN AND WARD, 1; SHERIFF'S SALE.

SEAL.

Transcript. See HEATON v. BUTLER, 143; SANDUSKY v. WEBB, 478; KER-
CHAVAL v. THE STATE, 478.

SET-OFF.

See DECEDENTS' ESTATES, 6, 7; PLEADING, 3, 4; VENDOR AND PURCHASER, 6.

1. *Judgments.*—The fact that two judgments are rendered in different courts does not prevent either party from having the one set off against the other.
Brooks v. Harris, 390
2. *Same.*—*Judgment Against Principal.*—There must be mutuality in the claims, in order that they may be set off against each other; but where a judgment has been obtained on the relation of A. against B. and his sureties on a constable's bond, B. may have a judgment obtained by him against A. set off against the judgment on the bond. *Ib.*
3. *Same.*—*Appeal.*—The fact that an appeal has been taken to the Supreme Court from the overruling of an application to allow an appeal from a justice of the peace after the time limited, does not prevent the judgment from being satisfied by setting off another judgment against it, unless a stay of proceedings has been had on the appeal. *Ib.*
4. *Same.*—*Equitable and Legal Title.*—Although an equitable title to the judgment has been acquired by a stranger before the motion is made by the judgment defendant to have it satisfied by being set off against another judgment, yet the legal title will control the equity and authorize the satisfaction. *Ib.*
5. *Same.*—*Motion.*—*Pleading.*—*Practice.*—A motion to satisfy judgments, by setting them off one against another, does not require a complaint or pleading. *Ib.*

SHERIFF.

See FEE BILL, 1, 2.

SHERIFF'S SALE.

1. *Strict Compliance with Law.*—The sheriff and execution plaintiff are held to a reasonably strict compliance with the statute in the sale of real estate under execution.
Voss v. Johnson, 19
2. *Failure to Offer Parcels Separately.*—Where a complaint to set aside such a sale, made to the execution plaintiff, alleged that the real estate consisted of two forty-acre lots, and the sheriff so treated it by offering one forty-acre lot separately, and then offered both lots together, the allegations were sufficient on demurrer. *Ib.*
3. *Same.*—*Bid.*—*Evidence.*—*Case Explained.*—Proof that the sheriff failed to offer the second forty-acre lot, before offering the entire eighty acres, authorized the setting aside of the sale, and the fact that the entire eighty acres only brought the amount of the execution was immaterial. *Sowle v. Champion*, 16 Ind. 165, explained by a fuller statement of facts from the transcript. *Ib.*

SPECIAL FINDING.

See PRACTICE, 22.

STATUTE OF FRAUDS.

See PLEADING, 18.

STATUTE OF LIMITATIONS.

See PLEADING, 20; PRACTICE, 2, 3; RAILROAD, 2.

1. *Pleading.*—*Answer.*—*Infancy.*—Where a plaintiff in her complaint alleged

that she was a minor, under the age of twenty-one years, and sued by her next friend;

Held, that an answer pleading simply the statute of limitations admitted her infancy, and was bad on demurrer. *Johnson v. Pinegar*, 168

2. *Fraud.—Conveyance Treated as Mortgage.*—Complaint against an administrator, alleging that a deed of conveyance of land to his decedent, absolute on its face, was a mortgage; that the decedent, as the attorney of the plaintiff, was guilty of gross fraud and violation of duty in procuring his client, the plaintiff, to execute a deed instead of a mortgage to secure liabilities incurred by the attorney in becoming bail for him, and for fees due the attorney; and that, to defraud the plaintiff, the decedent had conveyed the land to another; and asking that the estate of the decedent pay to the plaintiff the value of the land, less the amount due from the plaintiff to the decedent on account of such liabilities and fees. The administrator answered that the cause of action did not accrue within six years next before the commencement of the action, and, also, that more than eighteen months elapsed after the death of the decedent before the action was commenced.

Held, on demurrer to the answer, that whether the action was for relief against fraud, or to recover money, the answer was good.

Wallace, Adm'r, v. Metzker et al., 346

SUPERIOR COURT.

See EXECUTOR AND ADMINISTRATOR, 1; SUPREME COURT, 9, 11 to 14.

SUPREME COURT.

See APPEAL; APPEAL BOND; ATTORNEY, 3; BILL OF EXCEPTIONS; COUNTY CLERK, 3; DEMURRER, 2, 3; NEGLIGENCE, 4; PARTITION; RECORD.

1. *Assignment of Error.*—An assignment of error, that the judgment should have been for the defendant instead of for the plaintiff, is too general.

Hamrick v. The Danville, etc., Co., 170

2. *Same.*—A general assignment of error in overruling a motion for a new trial is all that is necessary to bring to the attention of the Supreme Court whatever grounds appear in the motion and the accompanying bill of exceptions, and a re-statement of them is unnecessary.

Dodge et al. v. Dunham, 186

3. If the sustaining of a demurrer to a pleading be not assigned as error, no question as to the ruling on the demurrer is presented to the Supreme Court.

Brown v. The L., R., & D. Gravel Road Co. et al., 209

4. *Questions of Fact from Scientific Sources before Jury.—Finding.—Rule upon Appeal.*—Where a question before a jury is dependent for its solution upon philosophical principles and mechanical skill and judgment, this court on appeal is as much bound to respect the conclusions of the jury as in any other case.

Gagg et al. v. Vetter et al., 228

5. *Appeal by Part of Defendants.*—Where only part of several co-defendants against whom a judgment or decree has been rendered appeal, without notice of the appeal to the others as required by statute, the appeal will be dismissed.

Heaton v. Butler et al., 143

Bash et ux. v. Evans, 144

Keller et al. v. Boatman, 277

6. *Demurrer.*—The questions as to the jurisdiction of the court over the subject-matter of the action, and as to the sufficiency of the complaint, are not waived by a failure to make the objection or to except, so as to prevent a review of the proceedings and judgment for either of these causes.

Davis v. Perry et al., 305

7. *Assignment of Error.*—The assignment, as a reason for a new trial, that the

judgment of the court is not sustained by the law and is contrary to law, presents no question for the decision of the Supreme Court.

Goodwine et al. v. Crane, 335

8. *Record*.—It is improper to make up a record for the Supreme Court in the form of a continuous roll. *Ib.*
9. *Appeal from Superior Court.—Assignment of Error*.—An assignment on appeal to the Supreme Court from a judgment of affirmance in the superior court, "that the court below in general term erred in affirming the judgment and finding of the court in special term," presents for review all the questions which were properly presented and decided at the general term. *Carney v. Street et al.*, 396
10. *Trial by Court.—Appeal*.—Where a judge is substituted for a jury in the trial of a case, the same rule applies on appeal as to the reversal on the sufficiency of the evidence, as though a jury had rendered the finding. *Ib.*
11. *Superior Court.—Appeal.—Assignment of Errors*.—Whatever errors are assigned on appeal from the superior court in general term to the Supreme Court must be predicated upon the assignment of errors in the general term and the action of that court in such term thereon. *Wesley et al. v. Milford*, 413
12. *Same.—Sufficiency of Complaint*.—Unless the question of the sufficiency of the complaint has been raised in the general term, it cannot be assigned as error in the Supreme Court. *PETTIT, C. J., and BUSKIRK, J., dissented. Ib.*
13. *Same.—Motion for New Trial*.—On such an appeal to the Supreme Court, the assignment as error of the overruling of a motion for a new trial, it was held, presented no question, as the court in general term did not overrule such motion. *Ib.*
14. *Same.—Proper Assignment of Error*.—It is suggested that probably an assignment, that the superior court in general term erred in affirming or reversing the judgment of the court at special term, would present for the consideration of the Supreme Court on appeal all the questions that were properly presented to that court in general term. *Ib.*
15. *Assignment of Error*.—On appeal to the Supreme Court, it may be assigned as error, that the complaint does not state facts sufficient to constitute a cause of action, although no demurrer has been filed in the lower court. *Mercer v. Patterson*, 440
16. *Same*.—Where no demurrer has been filed to an amended complaint, its sufficiency can only be questioned on appeal by a proper assignment of error. *Miller v. Billingsly*, 489
17. *Evidence*.—If there be evidence in support of the finding, this court will not disturb the finding on the weight of evidence. *Sparks v. Davis et al.*, 526
18. *Certiorari Without Motion.—Motion for Certiorari*.—At any time pending an appeal, this court, *ex officio*, may award a *certiorari*, to inform its conscience, for the purpose of affirming a judgment, but never to reverse it, or make error. On motion, supported by affidavit of diminution of the record, a *certiorari* is awarded either party. *Kesler v. Myers*, 543
19. *Affidavits.—Bill of Exceptions*.—Where a petition was filed in the circuit court for relief from a judgment in that court, dismissing an appeal from the judgment of a justice, and the petition was overruled, and the bill of exceptions did not contain the affidavits filed in support of the petition, but in lieu thereof, the words "heretofore inserted in this record;" *Held*, that the affidavits, not being properly part of the record, could not be considered by the Supreme Court. *Ib.*
20. *Transcript.—Statute.—Clerk's Duty*.—The statute declares what matters shall constitute a part of the record, and how the same shall be made a part thereof, and no rule of court regulates the practice. Section 559, 2 G. & H. 273. All proper entries made by the clerk, and all papers pertaining to a

cause and filed therein, and not relating to collateral matters, are by statute made parts of the record without a bill of exceptions. A motion to set aside a default is a collateral matter, and the affidavits supporting the motion are not parts of the record, unless made so by order of the court, or by a bill of exceptions in which they are incorporated. The judge may sign the bill of exceptions without the affidavits being inserted, if they are identified in the paper by distinct reference, and the proper place designated for their insertion, but the clerk, in making out the transcript, must insert them in full in the bill of exceptions. If the affidavits constituted parts of the record by force of the statute, the words "here insert" would be sufficient if a proper reference were made to them for identification, and they were already set out in the record. *Id.*

21. *Assignment of Errors*.—When a party appeals to the Supreme Court by filing the transcript in the office of the clerk of said court, no appeal having been prayed in the court below, and no notice having been served, he may, without having assigned error, have his process or notice to the appellee issued by the clerk of the Supreme Court, and afterward assign errors, "on or before the first day of the term at which the cause stands for trial."

Price v. Baker, Gov., 570

SURPRISE.

See NEW TRIAL, 1.

1. *Pleading.—Evidence*.—Where, in an action on account for goods sold, the defendant answered payment, to which the plaintiff replied the general denial;

Held, that the defendant could not, on the trial, claim to be surprised by the testimony of plaintiff that certain payments made were upon other than the account sued on. *Pauley v. Short, 180*

2. *Evidence*.—Except in particular cases, a party cannot be heard to say that he was surprised at the giving of evidence warranted under issues formed and tendered by himself. *Brownlee v. Kenneipp, 216*

3. *Same.—Affidavit of Stranger*.—An affidavit made by one who is not an agent or attorney of a party, or in any way connected with the case, wherein the affiant says he is informed and has reason to believe that a party has been surprised at evidence given, is bad. *Id.*

TAX.

See VENDOR AND PURCHASER.

1. *Lien of Poll and Personal*.—Real estate is liable for the poll tax and tax on personal property assessed against the owner thereof, although his title be extinguished afterward by the foreclosure of a mortgage thereon of older date than his purchase. *Isaacs v. Decker, Aud., et al., 410*

2. *Township Tax.—Incorporated Town*.—A tax for township purposes can be legally collected upon property within an incorporated town situated in the township where the tax has been levied.

Tilford, Aud., v. Douglass, Trustee, 580

TENDER.

Mortgage.—Condition.—A mortgage to secure a note for one thousand dollars contained the following clause: "We, the mortgagors, expressly agree to pay the sum of money above secured, without any relief from valuation or appraisement laws; reserving to themselves the right, and this note and mortgage is given upon that expressed condition, to pay the mortgage within the period of twenty days from the date hereof, the sum of nine hundred dollars, eight hundred cash and one hundred dollars in a promissory note payable one day after date, which he agrees to accept in consideration of the above mortgage debt and cause the same to be entered of record." On

the trial of an action to foreclose said mortgage, there was a special finding, that one of the mortgagors had offered to pay the eight hundred dollars and deliver the note for one hundred dollars, within the twenty days, on condition that the mortgagee would assign and transfer the note for one thousand dollars and the mortgage to a third person.

Held, that the offer did not amount to a tender within the above clause of the mortgage; and it was not important what reason the mortgagee gave for his refusal to accept the offer. *Ferguson et al. v. Wagner*, 450

TOWN.

See TAX, 2.

TOWNSHIP.

See TAX, 2.

TRESPASS.

See COSTS, 1, 2.

TRUST AND TRUSTEE.

See CONTRACT, 3; INTEREST.

TURNPIKE.

1. *Omitted Lands.—Correction by Appraisers.—Acts of 1867, 1869.—Proviso.*—Where in assessing lands for a turnpike road, there have been casual omissions of tracts of land, by the assessors appointed by the county commissioners, such omissions may be corrected, and such completed assessment may be answered by way of defence to the further prosecution of a suit to enjoin the collection of the assessment because of such irregularity. Upon the discovery of any omission of lands liable to be assessed, the county commissioners may, of their own motion, or at the instance of any one interested, reassemble the appraisers and require the proper correction to be made and direct the treasurer to add the same to the duplicate. The entire assessment is thereupon rendered valid. And the proviso in the repealing clause of the act of 1869, saving acquired rights under the act of 1867, authorizes a company which was under this act entitled to have an appraisement made, to avail itself of such amendment of the appraisement, after suit instituted against such company because of such omissions.

The Sand Creek Turnpike Co. et al. v. Robbins et al., 79

2. *Articles of Association.—Construction of Statute.*—The statute (1 G. & H. 474) requiring that the articles of association of a gravel road company shall set forth the amount of capital stock, etc., contemplates a statement of the amount of the capital stock in the body of the articles of association; and the defect caused by the omission of such statement is not cured by the fact that certain amounts are subscribed to the articles.

The State, ex rel. Howe, v. The Shelbyville, etc., Co., 151

3. *Pleading.—Complaint.*—Where, in an action on a subscription of stock to a gravel road company, the complaint alleges all the facts material, under the statute, of the organization of the company and subscriptions of stock, it is not insufficient because the copy of the articles of association filed with it shows only the name and amount subscribed by the defendant.

Hamrick v. The Danville, etc., Co., 170

4. *Articles of Association.—Description of Route.*—Where the articles of association of a turnpike company describe the proposed road as beginning at a point where two roads, which are named, touch each other at a certain corner of a certain section, and the route is described so that its line can be traced to a certain point in a certain section and range, where it terminates,

a failure to state the range of the section at the point of beginning will not render the description bad. *Estell v. The Knightstown, etc., Co.*, 174

5. *Same.—Calls for Stock.—Time of Payment.*—The power conferred upon the board of directors of a turnpike company to make calls for instalments of stock subscribed was not intended to prevent stockholders, in their articles of association, or in any written promise to pay for stock, from fixing the time of payment, but was conferred to enable the company to call in and enforce payment, when no time is fixed in the contract itself. If the time of payment is fixed by the terms of the subscription, the party subscribing is bound thereby. *Ib.*
6. *Pleading.*—In an action to recover the amount subscribed for stock to the articles of association of a gravel road company, by which the subscribers proposed to become incorporated thereafter, the complaint must allege that a subscription was obtained amounting to five hundred dollars per mile of the proposed road, and that the articles of association were filed in the proper recorder's office. *Hain v. The N. W. Gravel Road Co.*, 196
7. *Same.*—In such action, the complaint must show by averment of fact that all the steps required by law to bring such corporation into existence have been taken. *Ib.*
8. *Same.—Conclusion of Law.*—The averment that the company was legally organized is a conclusion of law, not an averment of fact. *Ib.*
9. *Same.*—The additional averment, that the defendant entered into such organization, adds no force to the former averment, it not appearing how he entered, or what he did.
10. *Appropriation of Land.—Damages.*—In a proceeding to appropriate land for a gravel road, the cost of material for a fence on each side of the road, where it runs through the land of which a portion is condemned, is a proper element of damages. *The Montmorency Gravel Road Co. v. Rock*, 263

VARIANCE.

See EVIDENCE, 6.

VENDOR AND PURCHASER.

See DOWER, 2; EXECUTOR AND ADMINISTRATOR, 2; GUARDIAN AND WARD, 2 to 10; HUSBAND AND WIFE, 9; MINOR; PROMISSORY NOTE, 1.

1. *Vendor's Lien.—Novation.—Transfer of Debt and Lien.*—A. sold and conveyed certain land to B., who thereby became indebted for purchase-money, one thousand two hundred and sixty-seven dollars; A. was indebted to C. one thousand two hundred and seventy-five dollars for certain other lands by C. sold to A., which indebtedness was secured by notes and mortgage on the lands; all the parties met and a complete novation took place. A. transferred to C. the amount that B. owed A.; B., instead of giving his notes to A., gave them to C., who surrendered his claim on A.; B. failed to pay his notes to C., who brought suit and obtained a decree enforcing his vendor's lien, and purchased under such decree the land so conveyed by A. to B.
Held, in a suit for possession by C. against D., who claimed title through one E., who had taken a mortgage with full notice of all the rights and equities of C., that the assignment of the debt itself, without the assignment of the evidence of the debt, carried with it the vendor's lien on the land; and C. was entitled to recover; that it is the unpaid purchase-money which creates the vendor's lien, and it is immaterial to whom the acknowledgment of the debt is made, if it be so made by direction of the vendor.

Nichols v. Glover, 24

2. *Quitclaim Deed.—Parol Contract.*—Where one conveys land by quitclaim deed, and agrees by parol to pay the taxes already charged against the land, and fails to make such payment, and his vendee thereupon pays the taxes, the vendor is not liable to an action for money paid for his use and at his

- request. OSBORN, J., was not prepared to say that the action might not be sustained, treating the promise to pay the taxes already due as part of the consideration for the purchase. *Headrick v. Wischert*, 87
3. *Action for Purchase-Money.—Failure of Title.*—In the absence of covenants and fraud, a failure of title is no defence to an action for the purchase-money of real estate. *Cartright v. Briggs*, 184
 4. *Same.—Injunction.*—A purchaser of land sold as school land, while he is in the undisturbed possession thereof, cannot enjoin the auditor of the county from selling the land under a mortgage to secure the purchase-money, on the ground that the title to the land was not in the inhabitants of the county. *Ib.*
 5. *Sale of Real Estate by Commissioner.—Action for Purchase-Money.—Making Deed.—Concurrent Acts.*—Where real estate was sold by a commissioner appointed by a court for that purpose, and the commissioner made to the purchaser a certificate of sale, reciting in it that a "deed was to be made when ordered by the court," but it contained no agreement or obligation on the part of the commissioner to make a deed; *Ib.*
Held, that the making of the deed, and the payment of the purchase-money, were not concurrent acts, and suit might be maintained for the last instalment of the purchase-money, without executing or delivering, or offering to execute and deliver, a deed. *Swindell et al. v. Richey*, 281
 6. *Same.—Lien Upon Real Estate.—Set-Off.*—Where the owner of real estate, sold by a commissioner, agrees, at the time of the sale, that he will pay the amount of a ditch assessment against the real estate, and save the land harmless from such assessment, the amount of such assessment which the purchaser may have been compelled to pay may be set off against the unpaid purchase-money, in a suit for the same by the commissioner. *Ib.*
 7. *Breach of Covenant.—Assignee.—Consideration.*—In an action by an assignee of a real covenant which runs with the land, for a breach thereof, the true consideration may be shown, as well as in an action brought by the immediate covenantor. *Gavin v. Buckles*, 528
 8. *Same.—Evidence.—Statute.*—Where the immediate grantor has died, and the action is brought against the person who conveyed the property to the deceased, the defendant is a competent witness to prove the consideration received from the deceased. The proviso of the second section of the act defining who shall be competent witnesses, 3 Ind. Stat. 559, does not include this class of cases. *Ib.*

VENDOR'S LIEN.

See PROMISSORY NOTE, 1; VENDOR AND PURCHASER, 1.

VENUE.

See CRIMINAL LAW, 4; HABEAS CORPUS, 1; JURISDICTION; PRACTICE, 7.

WARRANT.

See CRIMINAL LAW, 1.

WHARF.

See CITY, 5; RIVER.

WIDOW

See DECEDENTS' ESTATES, 1; PARTNERSHIP, 1, 2.

WILL.

Devise of Real Estate to County.—A devise of lands in these words: "I give and bequeath unto the board of commissioners of Kosciusko county, to be

appropriated by the board of commissioners, and their successors in office, for the use of Kosciusko county forever," etc., vested the absolute title in fee simple in the lands in the county of Kosciusko, to be managed by the board of commissioners or such other body or persons as the general assembly has provided or may provide to take the place of the board of commissioners.

Hayward et al. v. Davidson et al., 212

WITNESS.

See EVIDENCE, 7; HUSBAND AND WIFE, 1, 8; VENDOR AND PURCHASER, 8.

END OF VOLUME XLI.

Ex. 111.

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